levy taxes upon said lands or by asserting other civil and criminal jurisdiction over the same.

(d) At no time prior to the filing of motion herein for leave to file bill of complaint had any action been taken by either the State of Mississippi or the State of Louisiana to reach an agreement, one state with the other, to settle the alleged boundary dispute.

(e) The alleged boundary dispute, if one exists at all, is one which has arisen as a result of conflicting proprietary claims to such lands between citizens of the State of Mississippi, claiming title under Mississippi law, and citizens of the State of Louisiana, claiming title under Louisiana law, and no actual controversy of a justiciable nature has arisen between the two states mentioned as to a portion of the boundary between them; therefore, the State of Louisiana reasserts and reurges the position taken by it in its answer to rule to show cause why leave to file bill of complaint should not be granted, that the alleged boundary dispute is not actually a controversy between states for which original jurisdiction is conferred upon this Honorable Court, under Section 2 of Article III of the Constitution of the United States of America.

(2)

The State of Louisiana admits the correctness of the allegations contained in the second article of the bill of complaint.

(3)

The State of Louisiana admits the correctness of the allegations contained in the third article of the bill of complaint.

(4)

The State of Louisiana admits the correctness of the allegations contained in the fourth article of the bill of complaint.

(5)

Answering the fifth article of the bill of complaint, the State of Louisana admits that Warren County, State of Mississippi, is on the Mississippi River, between the 33rd and 31st degrees of north latitude. The State of Louisiana denies that large tracts of land known as Diamond Island, Diamond Island Towhead and Diamond Point are located in the County of Warren, State of Mississippi and are each and all part of the territory of the State of Mississippi, and alleges that such tracts of land are actually situated in the Parish of Madison, State of Louisiana and are each and all part of the territory of the State of Louisiana.

(6)

Except as may be hereinafter specially admitted, the allegations contained in the sixth article of the bill of complaint are denied.

It is admitted:

(a) That changes in the course of the Mississippi River have occurred since the States of Mississippi and Louisiana, respectively, were admitted into the union;

(b) That Diamond Island and Diamond Island Towhead, as the same presently exist, whether constituting a continuous body or separate tracts of land, is or are now situated to the westerly side of the present navigable stream of the Mississippi River;

(c) That said lands are joined to the Louisiana shore;

(d) That when the two states aforesaid were respectively admitted into the union, the thread of the Mississippi River formed the boundary to the east and the west, respectively, of said states; but that since the State of Louisiana was the first of the two states mentioned to have acquired statehood in the union, the

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v.

THE STATE OF LOUISIANA

ANSWER TO BILL OF COMPLAINT

ROBERT F. KENNON,
Governor of the State of Louisiana.

FRED S. LEBLANC,
Attorney General of the State of Louisiana.

W. C. PERRAULT,
First Assistant Attorney General, State of Louisiana.

CARROLL BUCK,
Second Assistant Attorney General, State of Louisiana.

BAILEY WALSH,
Assistant Attorney General, State of Louisiana.

JOHN L. MADDEN,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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THE STATE OF MISSISSIPPI, *Complainant*

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THE STATE OF LOUISIANA

ANSWER TO BILL OF COMPLAINT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States of America:

Comes now the State of Louisiana, through Robert F. Kennon and Fred S. LeBlanc, Governor and Attorney General, respectively, of said state, and also represented herein by the within named Assistant Attorneys General of the state aforesaid, and in compliance with the order of this Honorable Court, dated June 17, 1953, commanding the State of Louisiana to appear before said court and answer to the complaint of the State of Mississippi, now respectfully answers said bill of complaint, as follows, to-wit:

(1)

Answering the first article of the bill of complaint, the State of Louisiana denies that a controversy exists between

the State of Mississippi and the State of Louisiana, relative to a portion of the boundary between said states.

Further answering said article the State of Louisiana makes the following averments, to wit:

(a) At no time prior to the filing of motion herein for leave to file bill of complaint had the State of Mississippi, acting through its Governor, Attorney General or other authorized officer, represented to the State of Louisiana, acting through its Governor, Attorney General or other authorized officer, that the State of Mississippi claimed the lands herein involved, or any part thereof, as constituting a portion of the territory of the State of Mississippi.

(b) At no time prior to the filing of motion herein for leave to file bill of complaint had the State of Louisiana, acting through its Governor, Attorney General or other authorized officer, been given any notice, official or otherwise, by the State of Mississippi, its Governor, Attorney General or other authorized officer, that any controversy existed at all between the two states as to a portion of the boundary separating the two states at or near any point of land known as Diamond Island or Diamond Island Towhead.

(c) Not at any time between the date on which the State of Mississippi was admitted into the Union and the date on which motion was herein filed for leave to file bill of complaint had the State of Mississippi, acting through its Governor, Attorney General or other authorized officer, given any notice, official or otherwise, to the State of Louisiana, its Governor, Attorney General or other authorized officer, that any tract of land known as Diamond Island, Diamond Island Towhead or Diamond Point was claimed as constituting a part of the territory of the State of Mississippi and that the State of Louisiana had encroached or was encroaching upon the sovereignty of the State of Mississippi by levying taxes or attempting to

boundary of that state to the east was in no manner affected by the boundary or boundaries established by the Act of Congress for the State of Mississippi when the latter named state was admitted into the union.

(e) That the County of Warren, State of Mississippi, is located on the Mississippi River in the geographical positions mentioned in the sixth article of the bill of complaint.

(f) That, after the two states mentioned were respectively admitted into the union, the Mississippi River changed channels to the west, north and south and still later to the east and south of the lands subsequently formed and known as Diamond Island or Diamond Island Towhead; and,

(g) That the shift in the channel or course of the river through the so-called chute "did gradually widen and deepen over a period of years, ... until finally the new channel . . . became the principal or main channel of the Mississippi River . . .", and that, over a period of years, alleged by the State of Louisiana to be many, in fact, the old channel to the north, west and south of Diamond Island or Diamond Island Towhead was "gradually filled by sedimentation and accretion" to said island or towhead.

Further answering the sixth article of the bill of complaint, the State of Louisana shows that the allegati s contained in said article are vague and indefinite. Pl tiff has not undertaken to allege any specific locations with respect to governmental subdivisions or sections, township and ranges through which the Mississippi River ran after forming new channels, nor has it mentioned any year or years in which such changes were made; therefore, in admitting that changes were made in the main channel of the Mississippi River since the two states above named were respectively admitted into the union, defendant does not intend to concede, nor does it in fact

admit, that such changes were made at places where plaintiff may attempt to show that they occurred, and in what year or years they took place.

Further answering the allegations contained in the sixth article of the bill of complaint, the State of Louisiana also shows that the declarations made by the State of Mississippi in said article, relative to the physical or natural forces causing changes in the channel of the Mississippi River to be made, the effects of such changes in land formation and topography or land erosion, accretion and sedimentation, and the consequences thereof, both factually and legally, are founded largely on conjecture and theory, constitute mere conclusions of the pleader, represent argument, and are self-serving in design and purpose; therefore, the State of Louisiana feels justified in declining to answer and be bound by any admissions except as to factual averments in the bill of complaint.

(7)

Except as may be hereinafter specially admitted, the State of Louisiana denies the allegations contained in the seventh article of the bill of complaint.

It is admitted:

(a) That lands known as Diamond Point, as they presently exist, lie generally to the south of Diamond Island and Diamond Island Towhead;

(b) That the said Diamond Point was formed as the result of action or change in the course or courses of the Mississippi River, subsequent to the admission of the States of Mississippi and Louisiana, respectively, into the union;

(c) That accretion was formed, with respect to Diamond Point, after such change or changes in the course and channel of the Mississippi River, but that the same

occurred and attached itself to dry lands within the territory of the State of Louisiana;

(d) That, in about the year 1933, the Corps of Engineers of the United States, acting in conjunction with the Mississippi River Commission of the United States, in work for the improvement of navigation of the Mississippi River and flood control, did make and effect an artificial cut-off across the neck of Diamond Point;

(e) That such cut-off created a new channel for the Mississippi River and has become the main channel of said river as it traverses or flows through a portion of Diamond Point;

(f) That the old channel has in part been gradually filled and closed by sedimentation and accretion; and,

(g) That Diamond Point has not washed entirely away.

Further answering the seventh article of the bill of complaint, the State of Louisiana alleges that no attempt was made by plaintiff in its bill of complaint to locate Diamond Point by governmental subdivisions, sections, townships and ranges. Because of such inadequacy, indefiniteness and vagueness, defendant can only admit that a change was made in the course or channel of the Mississippi River, at, through or adjacent to Diamond Point, as such lands presently exist, resulting in a separation of such lands, leaving the greater part to the west of the present channel of the Mississippi River and the remaining portion to the east of said river; but in so admitting, defendant does not concede that such change in the course of the river was made at places where plaintiff may attempt to show that it occurred.

Further answering the seventh article of the bill of complaint, the State of Louisiana shows that plaintiff's declarations as to changes in land formation or topography, the location of accretion, how the latter was formed, and the consequences thereof, following the

change in the course or channel of the Mississippi River, are based largely on conjecture and theory, constitute conclusions of the pleader, represent argument, and are self-serving in nature; therefore, the State of Louisiana feels justified in declining to answer and be bound by any admissions except as to factual averments in the bill of complaint.

(8)

Answering the eighth article of the bill of complaint, the State of Louisana denies all and singularly the allegations thereof particularly refuting the accuracy of the line which plaintiff represents as forming the boundary between the States of Mississippi and Louisiana.

(9)

Answering the ninth article of the bill of complaint, the State of Louisiana represents that not until the motion was herein filed for leave to file bill of complaint did the officials of the State of Louisiana have any cause, reason or occasion to take any position in regard to the purported and alleged boundary dispute. They knew of no such controversy, and complainant is in error in declaring what facts or alleged facts that Louisiana officials have denied or would deny.

The State of Louisiana, acting through its Governor and Attorney General, do deny complainant's representations as to the legal effect or effects of changes made by erosion, alluvium, deposition, making of chute cut-off, artificial cut-off, and the like, now for the first time Louisiana officials have had knowledge of an alleged boundary dispute and occasion to be heard. The State of Louisiana and its officials admit that said state and its taxing subdivisions have levied taxes upon the lands involved in this purported boundary dispute and that citizens of said state and persons claiming title under citizens thereof are asserting title

to such lands, but the State of Louisiana and its officials deny that such taxation and assertions of title constitute an encroachment on the sovereign rights and powers of the State of Mississippi and to the rights and titles by the State of Mississippi accorded to its citizens and persons claiming title to lands under the laws of the State of Mississippi.

(10)

The State of Louisiana admits that the maps, surveys, charts and other documents described in the tenth article of the bill of complaint have been filed with the Clerk of the Supreme Court of the United States of America and that they are a part of the bill of complaint. It is denied, however, that said documents are controlling or furnish proof of the position taken by the State of Mississippi in this purported boundary controversy.

(11)

Answering the eleventh article of the bill of complaint, the State of Louisiana denies that it has infringed the sovereignty of the State of Mississippi; refutes the necessity of an adjudication on a purported issue which does not involve that character of controversy between states with which Section 2 of Article III of the Constitution of the United States of America deals, and disputes the claim of the State of Mississippi to levy and collect taxes on the lands involved in this alleged boundary issue.

Further answering said bill of complaint, the State of Louisiana alleges that;

(12)

Defendant has hereinabove referred to Diamond Island and Diamond Island Towhead as being one large body of land, the same as complainant has done in its bill of complaint; however, it will be seen from maps and charts to be offered in evidence for the record in this suit that Dia-

mond Island and Diamond Island Towhead were separate tracts of land when islands were first formed in such vicinity as a result of change or changes made in the course and channel of the Mississippi River.

(13)

The present thread or thalweg of the main channel of the Mississippi River in the immediate vicinity of Diamond Island or Diamond Island Towhead, as it presently exists, forms in that specific area the boundary between the State of Mississippi and the State of Louisiana. Such island or islands, formed as a result of the Mississippi River changing its course through the cut-off chute and gradually, after many years, forming there its main channel, is or are located in a generally westward direction from the present thread or thalweg of the main channel of the Mississippi River and is a part and portion of the territory of the State of Louisiana.

(14)

Lands comprising what subsequently became Diamond Point and adjacent points and islands were situated within the territory of the State of Louisiana, even before an avulsion or sudden and precipitous action of the Mississippi River in or about the year 1904, caused the river to cut through a portion of such lands and to form Diamond Point and adjacent areas as islands. Such action of the river did not change or alter the pre-existing boundary between the State of Mississippi and the State of Louisiana.

When, in or about the year 1933, the Corps of Engineers of the United States, acting in conjunction with the Mississippi River Commission of the United States, made and effected an artificial cut-off across the neck of Diamond Point, the effect of such action was not to change or alter the boundary in such vicinity between the State of Mississippi and the State of Louisiana but lands constituting Diamond Point, both to the east and west of the artificial cut-off, remained within the territory of the State of Louis-

iana, and to the east and south of the artificial cut-off Louisiana territory extended to the thread of the main channel of the Mississippi River as that channel existed prior to the flow of the river through such artificial cut-off.

Further answering said bill of complaint, the State of Louisiana makes the following representations in support of the plea which it interposes and urges that the State of Mississippi has long recognized Diamond Island or Diamond Island Towhead and Diamond Point as being a part of the territory of the State of Louisiana and is estopped to deny the latter's claim that such lands lie within its boundaries;

(15)

The State of Louisiana and its taxing subdivisions have levied and collected taxes upon said lands for a great number of years, all with the knowledge of and without complaint or protest on the part of the State of Mississippi.

(16)

For more than a half-century prior to the filing of motion for leave to file bill of complaint herein, many conveyances have been made of portions of said lands in which the property was described as being located in Madison Parish, Louisiana and the deeds evidencing such conveyances were filed in the records of the clerk of court of said parish and state to constitute public notice. The State of Mississippi is charged with notice of all such transactions.

(17)

In about the year 1907 the Board of Commissioners for the Fifth Louisiana Levee District had these lands, together with others, surveyed, claiming title thereto and asserting the same to be within the territory of the State of Louisiana. The State of Mississippi is charged with notice of such action. But, for more than forty-five years

said state has done nothing to protest or to seek an annulment of such title and territorial assertions.

(18)

For many years, all with the knowledge of and without protest from the State of Mississippi, the Parish of Madison, Louisiana and the State of Louisiana have exercised general civil and criminal jurisdiction over such lands and the residents thereof; and, to the extent of its authorized functions, the Board of Commissioners of the Fifth Louisiana Levee District has exercised jurisdiction over such lands in part.

(19)

Finally answering said bill of complaint, the State of Louisiana shows the court that the State of Mississippi precipitated this boundary dispute by claiming lands to be within its territory which had long been recognized as comprising a part of the territory of the State of Louisiana, and said state has and must bear the burden of proof. The State of Louisiana has refuted the claims of the State of Mississippi and has alleged that the lands involved lie within the territorial boundaries of the State of Louisiana.

WHEREFORE, the State of Louisiana prays:

(1) That the bill of complaint herein filed be dismissed as failing to state or show a controversy between states, under Section 2, Article III of the Constitution of the United States of America.

(2) In the alternative, that defendant's plea of acquiescence and estoppel against complainant be sustained and the bill of complaint dismissed.

(3) In the further alternative, and in the alternative only, that said bill of complaint is not dismissed, there be judgment by your Honorable Court establishing the boundary line between the State of Mississippi and the State of Louisiana at such place or location, so as to place Diamond

Island or Diamond Island Towhead and Diamond Point within the confines of the territory of the State of Louisiana.

Respectfully submitted,

ROBERT F. KENNON,
Governor of the State of Louisiana.

FRED S. LEBLANC,
Attorney General,
State of Louisiana.

W. C. PERRAULT,
First Assistant Attorney General,
State of Louisiana.

CARROLL BUCK,
Second Assistant Attorney General,
State of Louisiana.

BAILEY WALSH,
Assistant Attorney General,
State of Louisiana.

JOHN L. MADDEN,
Assistant Attorney General,
State of Louisiana.

Certificate

This is to certify that copies of the within answer to bill of complaint have been served upon counsel of record of the State of Mississippi.

Washington, D. C.
August 12, 1953

BAILEY WALSH
Assistant Attorney General
State of Louisiana
Of Counsel For The
State of Louisiana

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OCTOBER TERM, 1952

No. 11, Orig.

THE STATE OF MISSISSIPPI, *Complainant*,

v.

THE STATE OF LOUISIANA

ANSWER TO RULE TO SHOW CAUSE WHY LEAVE TO FILE BILL OF COMPLAINT SHOULD NOT BE GRANTED

ROBERT F. KENNON,
Governor of the State of Louisiana

FRED S. LEBLANC,
Attorney General of the State of Louisiana

W. C. PERRAULT,
First Assistant Attorney General, State of Louisiana

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THE STATE OF LOUISIANA

ANSWER TO RULE TO SHOW CAUSE WHY LEAVE TO FILE BILL OF COMPLAINT SHOULD NOT BE GRANTED

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States of America:

Now comes the State of Louisiana, through Robert F. Kennon and Fred S. LeBlanc, Governor and Attorney General, respectively, of said state, and also represented herein by the within named Assistant Attorneys General of the state aforesaid, and in compliance with the rule to show cause herein, issued by this Honorable Court on the fourteenth day of April, A.D., 1953, the State of Louisiana answers the motion of the State of Mississippi for leave to file bill of complaint against the State of Louisiana, as follows, to-wit:

(1)

The State of Louisiana denies that an actual controversy of a justiciable nature exists between the State of Mississippi and the State of Louisiana as to a portion of the boundary between them, and in that respect alleges:

(a) The State of Louisiana and its taxing subdivisions have levied taxes against the property comprising the area

aforesaid, all to the knowledge of and without complaint from the State of Mississippi, and which exercise of taxation is, in effect, declared to be a fact in paragraph (9) of the contemplated bill of complaint;

(b) The State of Louisiana has asserted general jurisdiction in said area, all to the knowledge of and without complaint from the State of Mississippi;

(c) At no time prior to the filing of motion herein for leave to file bill of complaint, had the State of Mississippi represented to the State of Louisiana, its Governor, Attorney General or any other constitutional officer thereof, that the State of Mississippi had any claim to the territory comprising said area or any part thereof;

(d) The desire on the part of the State of Mississippi to levy taxes in said area and to exercise civil and criminal jurisdiction and rights of sovereignty therein is insufficient to create an actual controversy of a justiciable nature between the two states;

(e) As shown by paragraph (9) of the contemplated bill of complaint, citizens of Louisiana claiming title under Louisiana law and citizens of Mississippi claiming title under Mississippi law have asserted conflicting ownership rights in and to the property comprising said area; however, the State of Louisiana represents and contends that disputes of that character between citizens of the two states do not constitute the jurisdiction to which Section 2 of Article III of the Constitution of the United States of America expressly contemplates and confers on this Honorable Court;

(f) No allegation is made in the motion to file bill of complaint or, indeed, in the contemplated bill of complaint itself that the State of Mississippi has levied taxes or attempted to levy taxes against the property which comprises the area aforesaid; and,

(g) No allegation is made in the motion to file bill of complaint or, indeed, in the bill of complaint itself that the State of Mississippi has exercised or undertaken to exercise any rights of sovereignty or jurisdiction in said area and, therefore, no basis is laid for the averment that the sovereignty of the State of Mississippi has been infringed by the State of Louisiana.

(2)

The State of Louisiana denies that the original jurisdiction of this Honorable Court to entertain the contemplated action is established under Section 2 of Article III of the Constitution of the United States of America, and further alleges that no actual controversy of a justiciable nature is set forth in and reflected by the contemplated bill of complaint.

(3)

The State of Louisiana has no knowledge concerning Senate Bill No. 522, allegedly enacted by the Legislature of the State of Mississippi at its 1952 Session.

(4)

For the reasons hereinabove shown, the State of Louisiana denies that it is necessary or appropriate for this Honorable Court to fix and establish the location of a portion of the boundary between the States of Mississippi and Louisiana.

(5)

The State of Louisiana is making this appearance for the sole and only purpose of answering the rule to show cause herein, and, if the said rule is made peremptory and leave to file bill of complaint is granted, the State of Louisiana reserves all rights to answer said bill of complaint and otherwise plead.

WHEREFORE, the State of Louisiana prays:

(1) That the foregoing answer to the rule to show cause be deemed sufficient and that it be relieved and discharged from responding further to said rule; and,

(2) That the leave sought by the State of Mississippi to file bill of complaint against the State of Louisiana be refused and denied.

Respectfully submitted,

THE STATE OF LOUISIANA

By: ROBERT F. KENNON,
Governor of the State of Louisiana

By: FRED S. LEBLANC,
Attorney General of the State of Louisiana

By: W. C. PERRAULT,
First Assistant Attorney General, State of Louisiana

By: CARROLL BUCK,
Second Assistant Attorney General, State of Louisiana

By: .....
John L. Madden,
Assistant Attorney General, State of Louisiana

Certificate

This is to certify that copies of the within answer to rule to show cause have been served upon counsel of record of the State of Mississippi.

WASHINGTON, D. C.
May —, 1953.

JOHN L. MADDEN,
Assistant Attorney General, State of Louisiana,
Of Counsel for the State of Louisiana.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

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THE STATE OF MISSISSIPPI,
Complainant,

vs.

THE STATE OF LOUISIANA,
Defendant.

REPLY OF COMPLAINANT TO AFFIRMATIVE ALLEGATIONS AND PRAYER FOR AFFIRMATIVE RELIEF CONTAINED IN ANSWER OF DEFENDANT CONSTITUTING IN EFFECT A COUNTER-CLAIM OF DEFENDANT AGAINST COMPLAINANT.

HUGH L. WHITE,
Governor of the State of Mississippi;

J. P. COLEMAN,
Attorney General of the State of Mississippi;

G. H. BRANDON,
Special Assistant Attorney General and Counsel for the State of Mississippi.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

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THE STATE OF MISSISSIPPI,

Complainant,

vs.

THE STATE OF LOUISIANA,

Defendant.

REPLY OF COMPLAINANT TO AFFIRMATIVE ALLEGATIONS AND PRAYER FOR AFFIRMATIVE RELIEF CONTAINED IN ANSWER OF DEFENDANT CONSTITUTING IN EFFECT A COUNTER-CLAIM OF DEFENDANT AGAINST COMPLAINANT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States of America:

Comes now the State of Mississippi, through Hugh L. White, Governor of said State, and J. P. Coleman, Attorney General thereof, and special assistant counsel for said State, and with respect shows that in and by Paragraphs 13, et seq. of the Answer of the State of Louisiana herein filed, the State of Louisiana has made certain affirmative averments and prayed the Court to grant unto it herein affirmative relief which in effect constitute a counter-claim

by the State of Louisiana, Defendant herein, against the State of Mississippi, Complainant herein, and to which the State of Mississippi deems it proper that it should reply, to the end that the issues between the parties in this action may be fully joined.

Now, therefore, the Complainant, the State of Mississippi, does thereunto answer, reply and plead as follows, to-wit:

(1)

Replying to Paragraph 13 of the Answer of the Defendant, the State of Mississippi denies all and singularly the allegations thereof; except that it is admitted that Diamond Island Towhead, after forming by accretion to Mississippi resulting in reliction from and against the former shores of Louisiana, was cut off from the mainland shores of the State of Mississippi as a result of the Mississippi River changing its course through the cut-off chute and gradually, after many years, forming there its main channel, and it is admitted that said Diamond Island Towhead and the accretions formed thereto are now located in a generally westward direction from the present main channel thread or thalweg of the Mississippi River; but it is here asserted that same nonetheless at all times was and yet is a part of the territory of the State of Mississippi.

(2)

Replying to Paragraph 14 of the Answer of the State of Louisiana, the State of Mississippi denies all and singularly the allegations thereof; except that the State of Mississippi admits that in or about the year 1933, the Corps of Engineers of the United States, acting in conjunction with the Mississippi River Commission of the United States,

made and effected an artificial cut-off across the neck of Diamond Point, and that the effect of such action was not to change or alter the boundary in such vicinity between the State of Mississippi and the State of Louisiana.

(3)

Replying to Paragraph 15 of the Answer of the State of Louisiana, the State of Mississippi denies all and singularly the allegations thereof.

(4)

Replying to Paragraph 16 of the Answer of the State of Louisiana, the State of Mississippi denies all and singularly the allegations thereof.

(5)

Replying to Paragraph 17 of the Answer of the Defendant, the State of Mississippi denies all and singularly the allegations thereof. Complainant avers that if it be true that about the year 1907 the Board of Commissioners for the Fifth Louisiana Levee District had a portion of the lands in controversy surveyed and claimed title thereto as being within the territory of the State of Louisiana, any such claim of the Board of Commissioners for the Fifth Louisiana Levee District was denied by the courts of Louisiana and no such claim has ever since been asserted by the State of Louisiana; and all such claims have ever since been abandoned by the Defendant.

(6)

Replying to Paragraph 18 of the Answer of the State of Louisiana, the State of Mississippi denies all and singularly the allegations thereof.

(7)

Replying to Paragraph 19 of the Answer of the State of Louisiana, the State of Mississippi denies all and singularly the allegations thereof; and the Complainant denies that the Defendant is entitled to any of the relief by it prayed.

By way of further denial of the right of the Defendant, the State of Louisiana, to have any of the relief for which the Defendant has prayed affirmatively or by way of counter-claim against the Complainant, the State of Mississippi does further aver and plead as follows, to-wit:

(8)

The State of Mississippi and its taxing subdivisions have levied and collected taxes upon the area and lands in controversy for a great number of years, all with the knowledge of and without complaint or protest on the part of the State of Louisiana, and, indeed, in its sovereign capacity by reason of the sale of portions of the lands for delinquent taxes, has owned certain parts and portions thereof, notably the said Diamond Island or Diamond Island Towhead, and executed forfeited tax land patents conveying the same.

(9)

That for much more than a half century prior to the institution of this suit and continuously over many years prior thereto many conveyances have been made under claims of Mississippi titles and under Mississippi laws of conveyance of all of the lands in controversy claimed by the Complainant to be within the sovereign jurisdiction and boundaries of the State of Mississippi wherein such lands are and have been described as located within Warren County in the State of Mississippi and the deeds and instru-

ments of conveyance evidencing such transactions were filed and are recorded in the Conveyance Records of Warren County, Mississippi to constitute public notice. The State of Louisiana is charged with notice of all of such transactions. That on divers and sundry occasions and in divers and sundry instances over a period of many, many years prior to the institution of this suit, and indeed over a period of time extending back more than half a century, the State of Mississippi through its courts has exercised civil and criminal jurisdiction and all rights and prerogatives of sovereignty over the lands and areas in litigation here claimed by the State of Mississippi to be within its sovereign boundaries, and indeed has exclusively exercised such jurisdiction thereover for a period of time of much more than fifty years prior to the date of institution of this suit.

(10)

That over a period of years extending for more than fifty years prior to the institution of this suit, and indeed at all times since the formation of the alluvial lands which are the subject of this litigation, the State of Mississippi by its executive and administrative officers and those of its political subdivisions has exercised full and exclusive jurisdiction and all rights, privileges and prerogatives of sovereignty over such lands and area and has claimed, asserted and maintained its sovereignty thereover as being a part of and within the territorial boundaries and limits of the State of Mississippi.

(11)

That continuously over a period of far more than fifty years prior to the institution of this suit and indeed at all times since the formation of the alluvial lands which are

the subject of this suit as being lands claimed by the State of Mississippi to be within its sovereign boundaries and limits, persons and individuals claiming rights and titles thereto under the laws of the State of Mississippi and as citizens of the State of Mississippi owing allegiance to said State, and entitled to the protection of said laws of the State of Mississippi have been, as they now are, in actual, open, notorious, adverse and hostile possession of such lands and area, claiming the same by virtue of the foregoing as owners thereof against the world and paying the taxes levied and assessed against the same by the State of Mississippi unto the State of Mississippi.

That the title, dominion and sovereignty of the State of Mississippi over the territory here in dispute and to the boundary herein asserted by it has long, and indeed at all times, been acquiesced in by the State of Louisiana.

Because of all of the foregoing facts, the Complainant avers and charges that the Defendant, the State of Louisiana, is guilty of laches and is estopped and barred from asserting any right or claim to relief as by it prayed in Paragraph 19 of its Answer and from having any of the relief by it, the Defendant, herein prayed; and furthermore, by reason of all the foregoing facts, and those averred in the original Complaint, the State of Mississippi has acquired full title and sovereignty to the territory shown herein to be in dispute, extending to the boundaries asserted by the State of Mississippi.

Wherefore, the State of Mississippi respectfully submits that all of the affirmative relief prayed by the State of Louisiana should be denied to it; and now further prays that by its decree the Court will fix and determine the boundary between the said two states so as to include within the territorial boundaries of the State of Mississippi all the

land, area and territory herein shown to be now in dispute between said states.

Respectfully submitted,

HUGH L. WHITE,
Governor of the
State of Mississippi;

J. P. COLEMAN,
Attorney General of the
State of Mississippi;

G. H. BRANDON,
Special Assistant Attorney General
and Counsel for the
State of Mississippi;

G. H. BRANDON,
Member of the Firm of Brandon,
Brandon, Hornsby & Handy,
Natchez, Mississippi,
Special Assistant Counsel.

Supreme Court of the United States

No. 11, Orig.

OCTOBER TERM, 1952.

THE STATE OF MISSISSIPPI,
Complainant,
vs.
THE STATE OF LOUISIANA,
Defendant.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

and

BILL OF COMPLAINT.

HUGH L. WHITE,
Governor of The State of Mississippi,
Jackson, Mississippi,

J. P. COLEMAN,
Attorney General of The State of Mississippi,
Jackson, Mississippi.

G. H. BRANDON,
of BRANDON, BRANDON, HORNSBY & HANDY,
Natchez, Mississippi,
Special Assistant Counsel.

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Supreme Court of the United States

No. .....

OCTOBER TERM, 1952.

THE STATE OF MISSISSIPPI,
Complainant,

vs.

THE STATE OF LOUISIANA,
Defendant.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT.

To the Honorable Fred M. Vinson, Chief Justice of the Supreme Court of the United States of America, and Associate Justices:

The State of Mississippi, one of the states of the United States of America, appearing herein through Hugh L. White and J. P. Coleman, the Governor and the Attorney General, respectively, of said state, and the undersigned special assistant counsel, moves for permission to file herein its Bill of Complaint in equity against the State of Louisiana, another state of the United States of America, and in support hereof shows:

(1)

The action arises out of a controversy and dispute existing between the said two states as to a portion of the boundary between them.

(2)

The original jurisdiction of this court is established under Section 2 of Article III of the Constitution of the United States of America.

(3)

The institution of this action has been specifically authorized pursuant to Senate Bill No. 522, Laws of Mississippi of 1952, enacted by the Legislature of the State of Mississippi at its 1952 Session, and approved by the governor of said state on April 11, 1952.

(4)

The adjudication thereof by this Court is necessary to settle this controversy existing between the States of Mississippi and Louisiana and to fix and establish the location of the true boundary line in dispute.

Respectfully submitted,

(s) Hugh L. White,

HUGH L. WHITE,
Governor of The State of Mississippi,
Jackson, Mississippi,

(s) J. P. Coleman,

J. P. COLEMAN,
Attorney General of The State of Mississippi,
Jackson, Mississippi.

G. H. Brandon,

G. H. BRANDON,
of BRANDON, BRANDON, HORNSBY & HANDY,
Natchez, Mississippi,
Special Assistant Counsel.

Supreme Court of the United States

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THE STATE OF MISSISSIPPI,
Complainant,

vs.

THE STATE OF LOUISIANA,
Defendant.

BILL OF COMPLAINT.

To the Honorable Fred M. Vinson, Chief Justice of the Supreme Court of the United States of America, and Associate Justices:

The Complainant, the State of Mississippi, one of the states of the United States of America, appearing herein through Hugh L. White, Governor of said state, and J. P. Coleman, Attorney General thereof, and special assistant counsel, with leave of your Honorable Court first obtained, presents this its suit against the State of Louisiana, another state of the United States of America, and, with due respect, the Complainant avers:

(1)

That a controversy has arisen between Complainant, the said State of Mississippi, and the said State of Louisiana relative to a portion of the boundary line between those two states; that no agreement can be had or reached between said states settling said boundary; and that it is necessary that same be determined by judgment of your Honorable Court in the exercise of its original jurisdiction.

(2)

Your Complainant further alleges that the State of Mississippi was entered into the Union of the United States of America by and pursuant to Act of Congress of March 1, 1817, found in Chapter 28 of the United States Statutes at Large, Volume 3, page 348, approved March 1, 1817, the resolution accepting the State of Mississippi into the Union, being dated December 10, 1817, and is found in Volume 3, pages 472-3, United States Statutes at Large, approved December 10, 1817, and in said Act of Congress the boundaries of the State of Mississippi were described as follows:

> "Beginning on the River Mississippi, at the point where the southern boundary line of the State of Tennessee strikes the same, thence east along the said boundary line to the Tennessee River; thence up the same to the mouth of Bear Creek, thence by a direct line to the northwest corner of the County of Washington, thence due south to the Gulf of Mexico, thence westwardly including all the islands within six leagues of the shore, to the most eastern junction of Pearl River with Lake Borgne, thence up said river to the thirty-first degree of north latitude, thence west along said degree of latitude to the Mississippi River, thence up the same to the beginning."

(3)

Your Complainant further alleges that the State of Louisiana was admitted into the Union of the United States of America by Act of Congress found in Chapter 50 of the United States Statutes at Large, Volume 2, page 701, approved April 8, 1812, and therein the boundaries of said State of Louisiana, in the preamble of said Act, were described as follows:

> "Whereas, the representatives of the people of all that part of the territory or country ceded under the name of 'Louisiana' by the treaty made at Paris on the 30th day of April, 1803 (8 Stat. at L. 200) between the United States and France contained within the following limits, that is to say:
>
> "Beginning at the mouth of the river Sabine; thence by a line drawn along the middle of said river, including all islands to the 32nd degree of latitude; thence due north to the northern most part of the 33rd degree of north latitude; thence along said parallel of latitude to the River Mississippi; thence down said river to the River Iberville; and from thence along the middle of said river to Lakes Maurepas and Pontchartrain to the Gulf of Mexico; thence bounded by said Gulf to the place of beginning * * * etc."

That by Act of Congress, found in the United States Statutes at Large, Volume 2, page 708, Chapter 57, approved April 14, 1812, additional territory was added to the then existing State of Louisiana, which added territory gave to the State of Louisiana all that territory south of the 31st degree of north latitude lying between the Mississippi River and the Pearl River, and extending down the Pearl River to the Gulf of Mexico, but for reasons shown it is not necessary to particularly define said additional territory.

(4)

That according to the foregoing descriptions the western boundary of that portion of the State of Mississippi lying between the 33rd and 31st degrees of north latitude and the eastern boundary of that portion of the State of Louisiana lying between the 33rd and 31st degrees of north latitude were formed by the Mississippi River, beginning at the northeast corner of the State of Louisiana, as hereinabove described, and extending south to the 31st degree of north latitude; and to that extent the boundaries between the two states as fixed in the foregoing descriptions were identical, in that the thread or center of said river formed said boundaries originally. That the said boundary was also declared and recognized by the Constitution of the State of Mississippi as the original western boundary of that part of the State of Mississippi between the 33rd and 31st degrees of north latitude.

(5)

That Warren County, State of Mississippi, is on the Mississippi River, between the 33rd and 31st degrees of north latitude.

That in said County of Warren, State of Mississippi, there are large tracts of land known as Diamond Island, Diamond Island Towhead and Diamond Point, which are each and all part of the territory of the State of Mississippi.

(6)

As to the said tract of land now known as Diamond Island and Diamond Island Towhead, which the Complainant claims and contends is a part of and within the territorial limits of the State of Mississippi and forms a part

of the State of Mississippi over which the Complainant exercises its sovereignty, the Complainant avers as follows, to-wit:

That because of the changes in the course of the navigable stream of the Mississippi River, effected over the years since the boundaries between the State of Louisiana and the State of Mississippi were fixed and established by Acts of Congress as aforesaid, said Diamond Island or Diamond Island Towhead (the names and designations being now used interchangeably), which now forms one body of land, is now situated to the westerly side or right side of the present navigable stream of the Mississippi River and is joined in part to the Louisiana shore; but despite said fact the same has ever been and is now within the territorial limits of the County of Warren and State of Mississippi; and in support of the foregoing allegation of fact, Complainant charges and avers with reference to the formation of said land known as Diamond Island and as Diamond Island Towhead the following, to-wit:

That at the time when the State of Louisiana was admitted to the Union as a state by Act of Congress as aforesaid, the boundary of the State of Louisiana at the point and place where said Diamond Island or Diamond Island Towhead is presently situate (the same being south of the 32nd degree of north latitude and north of the River Iberville) was designated as being down the Mississippi River—the thread or center of said river forming said boundary originally; and by the aforesaid Act of Congress of the United States of March 1, 1817, entitled, "An Act to Enable the People of the Western Part of Mississippi Territory to Form a Constitution and State Government, and for the Admission of said State into the

Union, on an Equal Footing with the Original States"— pursuant to which the State of Mississippi was formed and admitted to the Union as a state, the western boundary of the territory to be included within said state north of the 31st degree of north latitude and south of the southern boundary of the State of Tennessee was designated as being up the Mississippi River, and that the thread or center of said river formed said boundary originally.

That the County of Warren, State of Mississippi, is, as aforesaid, on the Mississippi River north of the 31st degree of north latitude and north of said River Iberville and south of said 33rd degree of north latitude and south of the southern boundary of the State of Tennessee.

That thereafter at the place where said Diamond Island or Diamond Island Towhead is now located and opposite the original mainland of said Warren County, Mississippi, the land on the Mississippi River in the State of Louisiana gradually wore off by erosion and caved into the Mississippi River and disappeared, while at or near said point the shore or bank of the Mississippi River on the Mississippi side was gradually extended in a westerly direction by accretions formed successively and imperceptibly to the soil of said shore until it extended westerly as a point of land projecting westwardly to the place where the most westerly portion of said Diamond Island or Diamond Island Towhead is now located; that as the Mississippi shore or bank along the Mississippi River was thus extended in a westerly direction by alluvium formed by accretion, the thalweg or thread of the channel of the Mississippi River was likewise extended in a westerly direction; that as the thread of said channel was thus extended westwardly the boundary line between the States of Louisiana and Mississippi was also extended westwardly in like manner and

in like distances, remaining at all times to the north, west and south of the point or projection of land thus formed and attached to the Mississippi shore.

That after the boundary line between the said states had been thus extended westerly so as to include within the territorial limits of the State of Mississippi the land which is presently known and designated as Diamond Island and as Diamond Island Towhead and which was formed as a point of land formed by accretion to the Mis sissippi shore and as a part of the territorial limits of the State of Mississippi, the Mississippi River cut across said point of land through a chute thereby forming what is known as a chute cut-off, so doing by avulsi n, forming a new but minor channel across said point of land, thereby cutting off a portion thereof from the Mississippi mainland and forming an island which was thereafter known and designated as Diamond Island or Diamond Island Towhead; but yet in so doing, the Mississippi River yet flowed in a main channel around to the north, west and south of said Diamond Island or Diamond Island Towhead, leaving the same yet upon the Mississippi side of the then main channel of the Mississippi River; and said island when so formed was, continued to be, and now is within and a part of the territorial limits of the State of Mississippi and the County of Warren in said state.

That thereafter the new channel which was thus formed by the action of the Mississippi River in cutting across said point of land through said chute cut-off and making said chute cut-off did gradually widen and deepen over a period of years and the old or original channel which lay to the north, west and south of said Diamond Island or Diamond Island Towhead was gradually filled by sedimentation and accretion, in most part formed, de- posited and accreted to the said island, and hence to terri-

tory of the State of Mississippi, and in small part formed to the Louisiana mainland, until finally the new channel thus formed as above alleged became the principal or main channel of the Mississippi River and the old channel was gradually filled by accretion, deposition and alluvium until finally the said accretions formed to said island in most part and that formed in small part to the Louisiana mainland met at certain places and the water of the Mississippi River ceased to flow at low stages therein and between said Diamond Island or Diamond Island Towhead, Mississippi shore, and the Louisiana mainland shore.

That the said Diamond Island or Diamond Island Towhead never washed away and at the time said new channel of the Mississippi River was formed by the action of that river in cutting across said point of land through said chute cut-off and forming said island, the line between the States of Louisiana and Mississippi was in and thereafter remained in the center of the old channel which flowed to the north, west and south of said point of land and of the land thus formed into an island designated as Diamond Island or Diamond Island Towhead, and which old channel was and is to the north and west of the new channel made by the action of the river in cutting across said point of land through said chute cut-off. That when the water thus ceased to flow through said old channel as above described and became stagnant, the boundary line between the States of Louisiana and Mississippi then became fixed in the middle or thread of the old navigable channel and was not afterward affected or changed by the filling up of the said old channel, and that said line is now the boundary line between said States of Louisiana and Mississippi at that place; and all the territory and land which formed said Diamond Island or Diamond Island Towhead and all the accretion land that has formed thereto since said is-

land was formed, being all that lying to the south, east and north of said old channel, was, remained and is the land known and designated as Diamond Island or Diamond Island Towhead and accretion thereto and all is in Warren County, State of Mississippi, and it is that land so thus formed that now constitutes Diamond Island or Diamond Island Towhead being in Warren County, State of Mississippi to the north, west and south of which the line between the State of Mississippi on the one part and the State of Louisiana on the other part lies.

(7)

That as to said point of land known as Diamond Point which lies generally to the south of the hereinabove referred to tract and body of land known as Diamond Island and Diamond Island Towhead, the Complainant, without reiterating the allegations hereinabove made and contained with reference to the location and designation of the original boundary between the States of Louisiana and Mississippi, does aver that the same was formed as a point of land by accretion and the deposition of alluvium to the Mississippi mainland by gradual deposition during the course of the movement and action of the Mississippi River hereinabove described which successively formed the point of land that by the chute cut-off became Diamond Island or Diamond Island Towhead and which by subsequent accretion to said Diamond Island or Diamond Island Towhead formed a larger body of land constituting, as aforesaid, the large body known as Diamond Island or Diamond Island Towhead as same presently exists; and shows and avers that at the point or place and in the vicinity of where the said Diamond Point is now situate, and which forms a part of Warren County, Mississippi, the land on the Mississippi River originally in the State of Louisiana gradually wore off by erosion and caved into

the Mississippi River and disappeared, while at or near said point and in the vicinity thereof the shore or bank of the Mississippi River on the Mississippi side was gradually extended in a westerly and northwesterly direction by accretions formed successively and imperceptibly to the soil of said Mississippi shore until it extended westwardly and northwestwardly as a point of land projecting in that direction to, where and over which said Diamond Point is now located; that as the Mississippi shore or bank along the Mississippi River was thus extended in a westerly and northwesterly direction by alluvium formed by accretion, the thalweg or thread of the channel of the Mississippi River was likewise extended in a westerly and northwesterly direction; that as the thread of said channel was so thus extended, the boundary line between the States of Louisiana and Mississippi was also extended westwardly and northwestwardly in like manner and in like distances, remaining at all times to the northwest and west of the point or projection of land thus formed and attached to the Mississippi shore and known as Diamond Point.

That after the boundary line between the said states had been thus extended northwestwardly and westwardly so as to include within the territorial limits of the State of Mississippi the land which is presently known and designated as Diamond Point and which was formed as a point of land by accretion to the Mississippi shore and as a part of and hence within the territorial limits of the State of Mississippi; and in about the year 1933, the Corps of Engineers of the United States, acting in conjunction with the Mississippi River Commission of the United States, in work for the improvement of navigation of the Mississippi River and flood control, did make and effect an artificial cut-off across the neck of said point of land at or near the most

easterly of Mississippi mainland shore base thereof, thereby forming a new channel of the Mississippi River and thereby cutting off said Diamond Point from the mainland of the State of Mississippi and artificially forming an island which yet, however, remains known and designated as Diamond Point; but yet when such was done the Mississippi River continued to flow in its main channel around said Diamond Point for some time; and said island when so thus artificially formed was, continued to be, and now is within and a part of the territorial limits of the State of Mississippi and Warren County in said state.

That thereafter the new artificial channel thus made as above described over the years has deepened and widened and has become the main channel for flow of the waters of the Mississippi River and for navigation and the old or original channel which prior to the making of said artificial cut-off lay to the north, northwest and west of said Diamond Point has been gradually filled by sedimentation and accretion in most part formed to said Diamond Point in Mississippi except where such accretion has formed to Diamond Island or Diamond Island Towhead in Mississippi, and in small part such sedimentation and accretion in the old thread of the river has formed to the Louisiana mainland, until finally the old channel has in large part been gradually filled and closed by sedimentation and accretion and the water of the Mississippi River has ceased to flow at low stages therein around said Diamond Point: That said Diamond Point has not washed away and the line between the States of Louisiana and Mississippi to the northwest of said Diamond Point at its westerly extent and to the west thereof to where the old river channel connects with Palmyra Lake (in which the boundary between the State of Louisiana and the State of Mississippi lies to the west of what is known as Davis Is-

land) became fixed in the middle of the old navigable channel and was not thereafter affected or changed by the making of the artificial cut-off aforesaid or the filling up of said old channel.

(8)

The Complainant avers that in the vicinity where this dispute exists the line between the State of Louisiana and the State of Mississippi is as follows:

> Beginning at a point where the present thalweg or center of the navigable thread of the Mississippi River flowing southwardly intersects the line designated as the line demarcating 32 degrees 15 minutes of north latitude and flowing down the same to the point where the present thread or thalweg of the Mississippi River intersects the point where such thalweg or thread did lie at the time when, as aforesaid, the waters of the Mississippi River last ceased to flow around and to the north, west and south of Diamond Island or Diamond Island Towhead; from thence along the line of what was the thread or thalweg of the Mississippi River at the time when the waters of the Mississippi River last ceased to flow around to the north, west and south of) said Diamond Island or Diamond Island Towhead, following the course thereof across the body of alluvium and accretion that has since formed; from thence around the said originally formed island known as Diamond Island which was cut off by said chute cut-off as aforesaid (i. e. to the north, west and south thereof) to the point where said line intersects the line of the thread or thalweg of the main channel of the Mississippi River as it existed and flowed around Diamond Point prior to the date of the artificial cut-off known as Diamond Cut-Off made by the United States Engineers and the Mississippi River Commission in 1933; from thence westwardly and southwardly to the north and west of said Diamond Point in the channel or thread or thalweg of the Mis-

sissippi River as same existed when the waters of the Mississippi River last ceased to flow around Diamond Point as a result of the making of said artificial Diamond Cut-Off; and thence to the point where same enters into or intersects the original thread of the stream of the Mississippi River as it once flowed through what is now Palmyra Lake, that is to say, where same intersects the approximate line of 91 degrees 07 minutes west of Greenwich.

(9)

That the controversy between the State of Louisiana and the State of Mississippi has arisen from the following facts:

Complainant is advised that officials of the State of Louisiana deny the facts hereinabove set forth and alleged as to the changes made by erosion, alluvium, deposition, making of chute cut-off, artificial cut-off, and the like, and the legal effect thereof as altering the position of the original boundary between the States of Mississippi and Louisiana and fixing the same along the line contended for by the State of Mississippi as hereinabove set forth; the State of Louisiana has encroached upon the sovereignty of the State of Mississippi by levying taxes or attempting to levy taxes upon lands that are thus within the territorial limits of the State of Mississippi and within its sovereignty and jurisdiction; and citizens of the State of Louisiana and persons claiming title under citizens of the State of Louisiana or claiming title under the laws of the State of Louisiana are asserting title to lands on the Mississippi side of the boundary between the states as hereinabove described as being within the State of Louisiana contrary to the sovereign rights and powers of the State of Mississippi and to the rights and titles by the State of Mississippi accorded to its citizens and persons claiming

title to lands under and by virtue of the laws of the State of Mississippi; wherefore, as aforesaid, it is necessary that the line between the states and the boundary between the states at the points hereinabove designated be settled and determined by judgment of this Honorable Court in the exercise of its original jurisdiction. That is to say, it is necessary that the boundary between the State of Mississippi and the State of Louisiana be determined by judgment of this Honorable Court in the exercise of its original jurisdiction on and along the western boundary of Warren County and more particularly within and between the points particularly described as follows, to-wit:

> Beginning at a point where the thalweg of the Mississippi River, as it now flows, crosses the line of 32 degrees 15 minutes of north latitude, and extending from thence to a point where the said boundary in the old bed of the Mississippi River now known as Palmyra Lake crosses the meridian line 91 degrees and 7 minutes west of Greenwich.

(10)

That Complainant attaches hereto maps, surveys, charts and other documents and makes same a part hereof, and they are marked exhibits, as follows:

(1) Copy of Map No. 31 with title made by Captain Young from reconnaissance survey of 1821, scale of lengths 1 inch to 1 mile, scale of breadths 2 inches to 1 mile, and copy of table of conventional signs for use with said map.

(2) Copy of sketch map of Lieutenant Ross entitled "Course of the River Mississippi from the Balise to Fort Chartres" of date 1765.

(3) Copy of map of Captain Pittman entitled "A Draught of the River Mississippi from the Balise up to Fort Chartres," said map being dated 1770.

(4) Copy of the General Cullot map entitled "Map of the Course of the Mississippi from the Missouri and the Country of the Illinois to the Mouth of this River," being of date 1826.

(5) Copy of plat of original entries and survey of Township 15 North, Range 2 East, Warren County, Mississippi, and of Township 14 North, Range 2 East, Warren County, Mississippi.

(6) Copy of plat of original entries and survey of Township 15 North, Range 14 East, Madison Parish, Louisiana, of Township 14 North, Range 13 East, Madison Parish, Louisiana; and of Township 14 North, Range 14 East, Madison Parish, Louisiana.

(7) (a) Copy of map of Louisiana State Board of Engineers of a date prior to the year 1867.

(b) Copy of map of Second Division, Louisiana Levees, embracing the right bank of the Mississippi River, surveyed under the direction of Capt. J. A. Porter, Chief Engineer, Second Division, Louisiana Levees, 1866, drawn by Fred Y. Dabney, Assistant Engineer.

(8) Copy of Map No. 20 with title made by Major Suter from Survey of Year 1874, scale: 1 inch to 1 mile.

(9) Copy of Map No. 18 published by Mississippi River Commission in 1883 from Survey of 1882 with subsequent surveys to the year 1899 superimposed thereon.

(10) Copy of Mississippi River Commission Charts Nos. 49 and 50 of the years 1878-1880.

(11) Copy of Mississippi River Commission Chart No. 49 of the years 1882-1883, 1895, 1908, and subsequent survey of 1912 superimposed thereon.

(12) Copy of Mississippi River Commission Chart No 51 showing survey of 1913.

(13) Copy of Map No. 18 on scale of 1 inch to 1 mile, published by Mississippi River Commission in 1916 from survey of 1913.

(14) Copy of Mississippi River Commission Chart No. 51 of the years 1913-1915.

(15) Copy of Map No. 19 published by Mississippi River Commission in 1916 on scale of 1 inch to 1 mile made from Survey of 1913.

(16) Copy of map of the Davis Island Quadrangle of United States Engineers showing topography in the year 1929.

(17) Copy of the Yokena Quadrangle of United States Engineers showing topography of the year 1930.

(18) Copy of three sheets covering area of Yokena Quadrangle and Davis Island Quadrangle, Mississippi River Low Water Survey of the years 1929 and 1930, being Sheet No. 3 of Mississippi River Commission Low Water Survey.

(19) Copy of Sheet No. 2 of Mississippi River Commission Low Water Survey of the years 1929-1930.

(20) Copy of Sheet No. 8 of Mississippi River Commission Low Water Survey of the years 1929-1930.

(21) Copy of Sheet No. 9 of Mississippi River Commission Low Water Survey of the years 1929-1930.

(22) Copy of Yokena Quadrangle published with Map Edition of 1935 showing the topography in 1930-1932.

(23) Copy of Mississippi River Commission Yokena Quadrangle Map published in 1939.

(24) Copy of Yokena Quadrangle published with Map Edition of 1950 based on surveys of 1935-1938 and 1940.

(25) Copy of Yokena Quadrangle published with Map Edition of 1951 based on surveys of 1935-1938 and 1940.

(26) Copy of Davis Island Quadrangle published with Map Edition of 1935 showing the topography in 1930-1932.

(27) Copy of Mississippi River Commission Davis Island Quadrangle Map published in 1939.

(28) Copy of Davis Island Quadrangle published with Map Edition of 1950 based on surveys of 1935-1938 and 1940.

(29) Copy of Davis Island Quadrangle published with Map Edition of 1951 based on surveys of 1935-1938 and 1940.

(30) Copy of map of Mississippi River Commission showing comparison of changes in course of Mississippi River below mouth of Arkansas River of the year 1765 with 1930.

(31) Copy of map of Mississippi River Commission showing comparison of changes in course of Mississippi River below mouth of Arkansas River of the year 1820 with 1930.

(32) Copy of map of Mississippi River Commission showing comparison of changes in course of Mississippi River below mouth of Arkansas River of the year 1861 with 1930.

(33) Copy of map of Mississippi River Commission showing comparison of changes in course of Mississippi River below mouth of Arkansas River of the years 1881-1893 with 1930.

(34) Copy of map of Mississippi River Commission showing comparison of changes in course of Mississippi River below mouth of Arkansas River of the years 1913-1921 with 1930.

(35) Copy of map of Mississippi River Commission showing comparison of changes in course of Mississippi River below mouth of Arkansas River of the years 1765, 1820 period, 1861, 1881-1893, 1913-1921 with 1930.

(11)

That, as aforesaid, the sovereignty of the State of Mississippi has thus been infringed by the State of Louisiana, and hence it is necessary that the boundary between the states at the aforesaid points and between the aforesaid points be determined by competent authority in order that each state may collect taxes on the property in dispute which rightfully belongs to it, and that the territorial jurisdiction of each state should be fixed to enable each state to exercise its proper civil and criminal jurisdiction.

That the Honorable R. F. Kennon is the Governor of the State of Louisiana and the Honorable Fred LeBlanc is the Attorney General thereof, and the official residence of each of them is in the City of Baton Rouge, State of Louisiana.

Wherefore, the premises considered, Complainant, the State of Mississippi, prays that the State of Louisiana be cited to answer hereto, through its said Governor and said Attorney General, and that after all necessary orders and proceedings, there be judgment of your Honorable Court fixing and determining the boundary line between the said states on and along the western part of the County of Warren, State of Mississippi between the points hereinabove designated in this Complaint.

The State of Mississippi,
Complainant,

By (s) Hugh L. White,
The Governor of said State,
Jackson, Mississippi,
By (s) J. A. Ireman,
The Attorney General of said
State, Jackson, Mississippi.

(s) G. H. Brandon

G. H. BRANDON,
Natchez, Mississippi,
Member of Firm of
BRANDON, BRANDON, HORNSBY & HANDY,
Special Assistant Counsel.

Office Supreme Court, U. S.
FILED
JUL 19 1954
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 11 Original

THE STATE OF MISSISSIPPI,
Complainant,

versus

THE STATE OF LOUISIANA,
Defendant.

MOTION FOR LEAVE TO INTERVENE AS CO-DEFENDANT, AND FOR ALTERNATIVE RELIEF; AND ANSWER OF INTERVENING CO-DEFENDANT.

L. BRYAN DABNEY,
of the law firm of
DABNEY & DABNEY, of
Vicksburg, Mississippi,
Counsel for Movants and
Intervening Co-Defendants.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

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THE STATE OF MISSISSIPPI,
Complainant,

versus

THE STATE OF LOUISIANA,
Defendant.

MOTION FOR LEAVE TO INTERVENE AS CO-DEFENDANT, AND FOR ALTERNATIVE RELIEF; AND ANSWER OF INTERVENING CO-DEFENDANT.

To the Honorable Earl Warren, Chief Justice of the Supreme Court of the United States of America, and Associate Justices:

The Motion of Eleanor R. Woolgar and Erma L. Richards, all adult residents and citizens of the State of Indiana, respectfully show to this Honorable Court, in support of their Motion of Intervention and for Alternative Relief, as follows:

Movants show that they are parties-plaintiff in that certain cause captioned "*Eleanor R. Woolgar and Irma L. Richards v. C. W. Hunter Company*," being Number 1940 on the docket of the United States District Court, Western District of Louisiana, Monroe Division, and which case has been consolidated with the cases of "*Albert W. Iselin et al. v. C. W. Hunter Company et al.*" Number 1939, and "*John F. Iselin v. J. H. Valentine*," Number 3066 in the same court; that a trial was had in said consolidated causes at the October 1952 Term of said United States District Court, and the said consolidated causes were taken under advisement by the District Judge, judgment to be rendered when a decision has been first rendered by the United States Supreme Court in the instant case.

Movants show that they are the owners of a certain tract of land which is the subject-matter of cause Number 1940 in the district court at Monroe, Louisiana, and which said tract of land is more particularly described, as follows, to-wit:

All of ~~Section Eighteen~~ (18) in Township Fourteen (14), North Range Fourteen (14) East in the District of Lands North of Red River, containing according to the original survey 629.12 acres of land situated in Madison Parish, State of Louisiana, together with all accretions accruing thereto.

That the ~~said quit-claim~~ deed was executed by Judge Jeff B. Snyder in favor of these Movants on

March 18, 1944, and was filed and recorded on March 18, 1944, in the office of the recorder of Madison Parish, Louisiana.

And Movants further show that said tract of land owned by them is situated in Madison Parish, State of Louisiana, and has always been known as wholly within the boundary of said State of Louisiana, and not within the boundary of the State of Mississippi.

And Movants further show that the State of Mississippi on the 15th day of June, 1953, filed her suit in this Honorable Court against the State of Louisiana, for the purpose of establishing a correct boundary line between these sister states between the following points:

Beginning at a point where the thalweg of the Mississippi River, as it now flows, crosses the line of 32 degrees 15 minutes of north latitude, and extending from thence to a point where the said boundary in the old bed of the Mississippi River now known as Palmyra Lake crosses the Meridian line 91 degrees and 7 minutes west of Greenwich.

And Movants show that the tract of land owned by them is situate and being on Diamond Point and wholly within the State of Louisiana and within the course of the Mississippi where a correct boundary line is prayed for by the State of Mississippi; that the pleadings in this cause show that the State of Mississippi in her original bill of complaint claims

her western boundary line down the disputed section encompasses and includes the said Section 18 and accretions owned by these Movants; that the Answer filed by the State of Louisiana vigorously disputes the claim of Mississippi to the said Section 18 and accretions, but Movants show and aver and charge the fact to be that since the filing of the said Answer, the State of Louisiana is now conceding Section 18 and accretions falls within the boundary of the said state of Mississippi, which Movants show is incorrect and erroneous and without foundation in fact.

And Movants show and aver and charge the fact to be that said Section 18 and accretions is wholly within the boundary of the State of Louisiana, and that this they are prepared to prove; and that at this very moment a Special Master of this Honorable Court is taking testimony in Vicksburg, Mississippi, relating to said disputed boundary line, and representatives of the State of Louisiana have on a number of occasions refused to accept or use information tendered by and on behalf of these Movants which it is claimed will conclusively show that their land—Section 18 and accretions—involved both in the pending case in the district court at Monroe, and in the disputed territory, is wholly within Louisiana.

Movants desire to call this to the specific attention of this Honorable Court: There are three distinct interests within this disputed boundary zone: Learned's, Hunter's and Movants' together with Iselins'. The Learned interests have been litigating within this dis-

puted boundary district for the past twenty odd years, and their counsel is now the special assistant attorney general of Mississippi; and the Hunter interests are identical with the C. W. Hunter Company who is the defendant in your Movants' case now pending in the District Court at Monroe, and whose counsel is actively participating in the instant case. Movants therefore, feel that in all equity that they should not be excluded from all participation in this proceeding which has the possibility of adversely affecting their case in the District Court at Monroe, should it go by default.

Movants cite the following authorities on the point as to Movants' right to have this Motion sustained:

Florida v. Georgia, 17 Howard, page 491, 15 L. Ed. 181;

Texas v. Florida, 306 U. S. page 398, 83 L. Ed. 817.

And they show and aver and charge the fact to be that the proceedings involved herein are not essentially an issue between the respective states but rather are an organized effort on the part of certain land owners to have the boundary adjusted in conformity to their own selfish interests.

And Movants show that the State of Mississippi has no legal right under the constitution and laws of the United States, or the decisions of this Court, to proceed with the prosecution of said cause for the reason that the State of Mississippi is resorting to the original

jurisdiction of this Court for the benefit of particular individuals, namely the Learned and Hunter interests, and that the suit for all practical purposes, could with perfect propriety be captioned *"Learned and Hunter, by the State of Mississippi, next friend v. The State of Louisiana."*

That it is impossible to find the line of demarcation between the interests of the State of Mississippi, and the private parties involved, and the whole has become, to use a vernacular expression, an olla podrida.

Movants cite as authority:

Oklahoma ex rel Johnson v. Cook, 304 U.S. 387 et seq. 82 L.Ed. 1416.

Movants ask that the Exhibit "A" attached to and made a part of their Answer, be made and considered a part of this Motion of Intervention as much so as if copied in full herein.

And Movants show to this court that they should be permitted to intervene as co-defendants to combat and controvert Mississippi's claim to have her western boundary extended to include their said tract of land; that to not permit them to so do will grieviously sacrifice their legal and constitutional rights.

And Movants further show that the proceedings in the instant case have not reached such a state as would cause any delay or embarassment to any of the parties concerned, by permitting your Movants to intervene.

And Movants attach hereto and tender the Answer of the Intervening Co-Defendants.

Wherefore, in conclusion, Movants pray that this Court may by due orders sustain the prayer of this Motion and permit them to intervene as co-defendants, or that in the alternative they be heard by this Honorable Court and the Special Master by evidence and briefs of their counsel as amicus curae and, figuratively speaking, drive the Learned and Hunter interests and their next friend, the State of Mississippi, out of their illy-fortified and illy-protected legal entrenchments.

Respectfully submitted,

ELEANOR R. WOOLGAR AND
ERMA L. RICHARDS,
Movants,

By L. BRYAN DABNEY, of the law firm of DABNEY & DABNEY, of Vicksburg, Mississippi, Counsel for Movants.

L. BRYAN DABNEY, of the law firm of DABNEY & DABNEY, of Vicksburg, Mississippi, Counsel for Movants.

CERTIFICATE.

This is to certify that copies of the within Motion f Intervention have been served on the Attorney eneral of the State of Mississippi, and the Attorney eneral of the State of Louisiana.

Vicksburg, Mississippi, the 23rd day of July, 1954.

L. BRYAN DABNEY, of the law firm of DABNEY & DABNEY, of Vicksburg, Mississippi, Counsel for Movants.

SUPREME COURT OF THE UNITED STATES.

October Term, 1954.

No. 11, Original.

THE STATE OF MISSISSIPPI,
Complainant,
versus
THE STATE OF LOUISIANA,
Defendant.

ANSWER OF INTERVENING CO-DEFENDANTS.

To the Honorable Earl Warren, Chief Justice, and Associate Justices of the Supreme Court of the United States of America:

The Answer of Eleanor R. Woolgar and Erma S. Richards, adult residents and citizens of the State of Indiana, Intervening Co-defendants herein, to the Bill of Complaint filed by the State of Mississippi, shows to this Honorable Court, as follows:

They neither admit or deny the allegations set forth in Article One of the bill of complaint;

They admit all and sundry the allegations set forth in Article Two of the bill of complaint.

They admit all and sundry the allegations set forth in Article Three of the bill of complaint.

They admit all and sundry the allegations set forth in Article Four of the bill of complaint.

Answering Article Five of the bill of complaint they admit that Warren County, State of Mississippi, is on the Mississippi River, between the 33rd and 31st degrees of north latitude, but deny specifically that Diamond Point and accretions thereto are located in the county of Warren and State of Mississippi, and are part of the State of Mississippi, but instead allege and show that said Diamond Point and accretions are wholly within the Parish of Madison, State of Louisiana.

They neither admit or deny the allegations set forth in Article Six of the bill of complaint.

They deny all and singular the allegations set forth in Article Seven of the bill of complaint with the exceptions:

It is admitted:

(a) That lands known as Diamond Point, as they presently exist, lie generally to the south of Diamond-Island and Diamond Island Towhead;

(b) That the said Diamond Point was formed as the result of action or change in the course or courses of the Mississippi River, subsequent to the admission of the States of Mississippi and Louisiana, respectively, into the union;

(c) That accretion was formed, with respect to Diamond Point, after such change or changes in the course and channel of the Mississippi River, but that the same occured and attached itself to dry lands within the territory of the State of Louisiana;

(d) That, in about the year 1933, the Corps of Engineers of the United States, acting in conjunction with the Mississippi River Commission of the United States, in work for the improvement of navigation of the Mississippi River and flood control, did make and effect an artificial cut-off across the neck of Diamond Point;

(e) That such cut-off created a new channel for the Mississippi River and has become the main channel of said river as it traverses or flows through a portion of Diamond Point;

(f) That the old channel has in part been gradually filled and closed by sedimentation and accretion; and,

(g) That Diamond Point has not washed entirely away.

Further answering the seventh article of the bill of complaint, they show and aver and charge the fact to

be that no attempt was made by plaintiff in its bill of complaint to locate Diamond Point by governmental subdivisions, sections, townships and ranges. Because of such inadequacy, indefiniteness and vagueness, defendant can only admit that a change was made in the course or channel of the Mississippi River, at, through or adjacent to Diamond Point, as such lands presently exist, resulting in a separation of such lands; leaving the greater part to the west of the present channel of the Mississippi River and the remaining portion to the east of said river; but in so admitting, defendant does not concede that such change in the course of the river was made at places where plaintiff may attempt to show that it occured or that any part of Diamond Point or accretion are in Mississippi.

Further answering the seventh article of the bill of complaint, they show that plaintiff's declarations as to changes in land formation or topography, the location of accretion how the latter was formed, and the consequences thereof, following the change in the course or channel of the Mississippi River, are based largely on conjecture and theory, constitute conclusions of the pleader, represent argument, and are self-serving in nature, therefore, they feel justified in declining to answer and be bound by any admissions except as to factual averments in the bill of complaint.

They deny all and singular the allegations set forth in Article Eight of the bill of complaint.

They deny and sundry all in Article Nine of the bill of complaint except that they admit that Diamond Point is in Louisiana and Louisiana has rightfully taxed the tract of land owned by them on Diamond Point and has exercised all sovereign rights and powers as she has a right to do.

Answering Article Ten of the bill of complaint, they admit that the maps, surveys, charts and other documents described in the tenth article of the bill of complaint have been filed with the Clerk of the Supreme Court of the United States of America and that they are a part of the bill of complaint. It is denied, however, that said documents are controlling or furnish proof of the position taken by the State of Mississippi in this purported boundary controversy.

Answering Article Eleven of the bill of complaint, they deny that Louisiana has infringed the sovereignty of the State of Mississippi; refutes the necessity of an adjudication on a purported issue which does not involve that character of controversy between the states with which Section 2 of Article III of the Constitution of the United States of America deals, and disputes the claim of the State of Mississippi to levy and collect taxes on the lands involved in this alleged boundary issue, or that any part of Diamond Point or accretions are in Mississippi.

And said Intervening Co-defendants show further that they are the owners of the following described tract or parcel of land:

All of Section Eighteen (18) in Township Fourteen (14), North Range Fourteen (14) East in the District

of Lands North of Red River, containing according to the original survey 629.12 acres of land situated in Madison Parish, State of Louisiana, together with all accretions accruing thereto, and being a part of Diamond Point in the State of Louisiana.

That the said quit-claim deed was executed by Judge Jeff B. Snyder in favor of them on March 18, 1944, and was filed and recorded on March 18, 1944, in the office of the recorder of Madison Parish, Louisiana.

And they further show that said tract of land owned by them is situated in Madison Parish, State of Louisiana, and has always been known as wholly within the boundary of said State of Louisiana, and not within the boundary of the State of Mississippi.

And they further show that the State of Mississippi on the 15th day of June, 1953, filed her suit in this Honorable Court against the State of Louisiana, for the purpose of establishing a correct boundary line between these sister states between the following two points:

Beginning at a point where the thalweg of the Mississippi River, as it now flows, crosses the line of 32 degrees 15 minutes of north latitude, and extending from thence to a point where the said boundary in the old bed of the Mississippi River now known as Palmyra Lake crosses the Meridian line 91 degrees and 7 minutes west of Greenwich.

And Intervening Co-defendants show that the tract of land owned by them is situate and being on Dia-

mond Point and wholly within the State of Louisiana and within the course of the Mississippi where a correct boundary line is prayed for by the State of Mississippi; that the pleadings in this cause show that the State of Mississippi in her original bill of complaint claims her western boundary line down the disputed section encompasses and includes the said Section 18 and accretion owned by them; that the Answers filed by the State of Louisiana vigorously disputs the claim of Mississippi to said Section 18 and accretions, but they show and aver and charge the fact to be that since the filing of the said Answer, the State of Louisiana is now conceding Section 18 and accretions falls within the boundary of the said State of Mississippi, which they show is incorrect and erroneous and without foundation in fact.

And they show and aver and charge the fact to be that said Section 18 and accretions is wholly within the boundary of the State of Louisiana, and that this they are prepared to prove; and that at this very moment a Special Master of this Honorable Court is taking testimony in Vicksburg, Mississippi, relating to said disputed boundary line, and representatives of the State of Louisiana have on a number of occasions refused to accept or use information tendered by on behalf of them which it is claimed will conclusively show that their land—Section 18 and accretions—involved both in the pending case in the District Court at Monroe, and in the disputed territory, is wholly within Louisiana.

And they attach hereto as Exhibit "A" to this Answer a copy of Map showing Channel Changes in vicinity of Davis Island, correct and present state boundary line being shown in red ink, and ask that same be made and taken as a part of this Answer, as much so as if copied in full herein.

They desire to call this to the specific attention of this Honorable Court: There are three distinct interests within this disputed boundary zone: Learned's, Hunter's and Movants' together with Iselins'. The Learned interests have been litigating within this disputed boundary district for the past twenty odd years, and their counsel is the special assistant attorney general of Mississippi in this boundary case; and the Hunter interests are identical with the C. W. Hunter Company who is the defendant in your Movants' case now pending in the District Court at Monroe and whose counsel is assisting the State of Mississippi.

They therefore, feel that in all equity that they should not be excluded from participation in this proceeding which has the possibility of adversely affecting their case in the District Court at Monroe, should it go by default.

They show that they are parties-plaintiff in that certain cause captioned *"Eleanor R. Woolgar and Irma L. Richards v. C. W. Hunter Company,"* being Number 1940 on the docket of the United States Dis-

trict Court, Western District of Louisiana, Monroe Division, and which case has been consolidated with the cases of "*Albert W. Iselin et al. v. C. W. Hunter Company et al.*," Number 1939, and "*John F. Iselin v. J. H. Valentine,*" Number 3066 in the same court; that a trial was had in said consolidated causes at the October 1952 Term of said United States District Court; and the said consolidated causes were taken under advisement by the District Judge, judgment to be rendered when a decision has been first rendered by the United States Supreme Court in the instant case.

And they show that the United States District Court at Monroe, took jurisdiction of the action there on the grounds that the land, the subject-matter of the suit, was situate, lying and being in Louisiana, and not in Mississippi.

And these intervening co-defendants show to this Court that the pleadings and transcript of the testimony in said consolidated cases in the United States District Court at Monroe show the full nature and extent of their claims in and to this land.

And Intervening Co-Defendants show that for many years, all with the knowledge of and without protest from the State of Mississippi, the Parish of Madison, Louisiana, and the State of Louisiana have exercised general civil and criminal jurisdiction over such

lands and the residents thereof; and to the extent of its authorized functions, the Board of Commissioners of the Fifty Louisiana Levee District has exercised jurisdiction over such lands in part.

Finally answering said bill of complaint, Intervening Co-Defendants show the Court that the State of Mississippi precipitated this boundary dispute by claiming lands to be within its territory which has long been recognized as comprising a part of the territory of the State of Louisiana and said state has and must bear the burden of proof.

In conclusion, Intervening Co-Defendants pray:

(a) That the bill of complaint herein filed be dismissed as failing to state or show a controversy between states, under Section 2, Article III of the Constitution of the United States of America.

(b) In the alternative, that Intervening Defendant's plea of acquiescence and estopped against complainant be sustained and the bill of complaint dismissed.

(c) In the alternative, and in the alternative only, that said bill of complaint is not dismissed, there be judgment by this Court establishing the boundary line between the State of Mississippi, and the State of Louisiana at such place or location, so as to place

Diamond Island, Diamond Island Towhead and Diamond Point within the confines of the territory of the State of Louisiana.

Respectfully submitted,

ELEANOR R. WOOLGAR and
ERMA L. RICHARDS,
Intervening Co-Defendants,
By L. BRYAN DABNEY, of the law firm of DABNEY & DABNEY, of Vicksburg, Mississippi, Counsel for Intervening Co-Defendants.

L. BRYAN DABNEY, of the law firm of DABNEY & DABNEY, of Vicksburg, Mississippi, Counsel for Intervening Co-Defendants.

CERTIFICATE.

This is to certify that copes of the within Answer of Intervening Co-Defendants have been served on the Attorney General of the State of Mississippi, and the Attorney General of the State of Louisiana.

Vicksburg, Mississippi, the 23rd day of July, 1954.

L. BRYAN DABNEY, of the law firm of DABNEY & DABNEY, of Vicksburg, Mississippi, Counsel for Intervening Co-Defendants.

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HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 11 Original

THE STATE OF MISSISSIPPI,
Complainant,

versus

THE STATE OF LOUISIANA,
Defendant.

ANSWER OF ELEANOR R. WOOLGAR AND IRMA L. RICHARDS, MOVANTS IN INTERVENTION, TO THE MOTION OF THE STATE OF MISSISSIPPI, AND THE STATE OF LOUISIANA TO REJECT AND DISMISS THEIR MOTION OF INTERVENTION.

L. BRYAN DABNEY,
Of the law firm of
DABNEY & DABNEY, of
Vicksburg, Mississippi,
Counsel for Eleanor R.
Woolgar and Irma L.
Richards.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 11 ORIGINAL.

THE STATE OF MISSISSIPPI,
Complainant,

versus

THE STATE OF LOUISIANA,
Defendant.

ANSWER OF ELEANOR R. WOOLGAR AND IRMA L. RICHARDS, MOVANTS IN INTERVENTION, TO THE MOTION OF THE STATE OF MISSISSIPPI, AND THE STATE OF LOUISIANA TO REJECT AND DISMISS THEIR MOTION OF INTERVENTION.

To the Honorable Earl Warren, Chief Justice of the Supreme Court of the United States of America and Associate Justices:

Now come Eleanor R. Woolgar and Irma L. Richards, both adult residents and citizens of the State of Indiana, and in this their answer to the Motion of the State of

Mississippi, concurred in by the State of Louisiana, to reject and dismiss their Motion of Intervention, show to this Honorable Court, as follows:

I:

Answering paragraph I of the Motion they emphatically deny that this is a bona-fide suit between the states of Mississippi and Louisiana; admit that these states are sister states in the federal union, but deny that they are sovereign with relation to the Constitution of the United States and the *Decisions* of the United States Supreme Court which are the *supreme law* of the land, the laws of any state or the decisions of her highest court to the contrary notwithstanding (and their counsel suggest to opposing counsel the propriety of taking a refresher course in American constitutional law by reading word for word Webster's Reply to Hayne on Foote's Resolution in the United States Senate in 1832, as well as Andrew Jackson's Nullification Proclamation;) and they deny that the instant suit was filed for the purpose of bona-fide fixing a boundary line within the designated seven or eight mile course; and again they deny that these states are sovereign with relation to the Constitution of the United States and the Decisions of the United States Supreme Court; and they further emphatically deny that this instant suit had any right to be instituted within the original jurisdiction of the United States Supreme Court pursuant to Article III, Section II, 2, of the Constitution of the United States, as will hereafter be shown in this Answer.

II.

They deny all and singular the allegations in paragraph II of the Motion; and especially do they reprobate and deny the allegation that any state in this federal union is sovereign with relation to the Constitution of the United States and the Decisions of the Un ted States Supreme Court; as will hereafter be shown in this Answer.

III.

They deny all and singular the allegations set forth in paragraph III of the Motion to the effect that the Motion of Intervention is in direct contravention and conflict with the provisions of the Eleventh Amendment to the Constitution of the United States of America; as will hereafter be shown in this Answer.

The Motion filed by the State of Mississippi, and concurred in by the State of Louisiana, travels over the same ground as the Original Petition heretofore filed in said cause. This Motion amply confirms the conclusion heretofore arrived at, that these two states are merely "fronts" by which private property owners are endeavoring to "establish" a boundary line, along the disputed section, to suit their convenience and selfish interests, and at the expense, and destruction of legal rights of these movants, when in fact a satisfactory boundary line already exists between the two states which conclusively shows that the lands of these Movants, Mesdames Woolgar and Richards, are clearly within the confines of the State of Louisiana, as shown by the exhibits hereinafter specially referred to; and that the prime purpose of said suit is

not to have the boundary adjudicated by this Honorable Court to settle an honest difference of opinion between sister states, but for the purpose of marking the boundary in such a fashion as will redound to the special benefit of private interests, and who are endavoring to use the instrumentalities of the courts and the protecting aegis of the federal constitution in the furtherance of their selfish scheme.

The empty platitudes appearing in the Motion can meet with no sympathizing response in the forums of this country, because it was never the intention of the founding fathers of the constitution that any of its provisions were available as a shield behind which one could hide and operate with impunity.

It is, of course, an elemental proposition that the original jurisdiction of this Honorable Court can only be invoked in a bona-fide action of one state against another. With this we are in hearty accord. But we insist, and we have behind us an unbroken array of authority, that it must not only appear, but must exist as a fact, that it is a bona-fide action between sister states, and that it is not brought for the benefit of private individuals, and that no private interests are lurking in the background to reap the full benefit of an action obstensibly brought by one state against another; but in reality this suit is nothing more or less, than a state acting as a "front" or next friend of private citizens and interests; and all of which precludes this Honorable Court taking original jurisdiction.

A hearing took place in Vicksburg, Mississippi, this past July before Honorable D. K. McKamy, Special

Master, and we are prepared ot testify as to the marked ability, dignity and impartiality with which that gentleman presided over the hearing, but he naturally had no control over the mechanics of this hearing or the introduction of testimony, all of which was left to the representatives of the respective states; nor could he be expected to know what had been going on for the past twenty-four years in state and federal courts, or the suits yet pending for decision in federal and state courts at the present time, relative to lands in this disputed section. He was concerned only with the immediate hearing.

At the Special Master's hearing only those witnesses especially desired and called by either of the states were permitted to testify, and with nearly perfect unanimity both states were in more or less agreement.

Not as a participant, but as an observer of these proceedings we were visibly impressed with the unanimity existing between the representatives of the two states, and one could hardly believe or realize that they were contestants and litigants in anything in particular, everything appearing to be by consent with hardly an objection rippling along the surface; in fact, it did so rival a pastoral scene by Corot. And we also noticed that all of the counsel representing the state of Mississippi were past or present counsel in suits now pending in the courts here and in Louisiana; some of the pending suits even now are awaiting a decision of the Supreme Court in the instant suit, should this Honorable Court not dismiss this whole proceeding as not warranting the application of its original jurisdiction, *as we claim it does not.* The private

counsel of Learned, Hunter, et al., had complete control and whether or not they displayed the labels of private counsel or as "Special" or "Associate" (whatever this is) Attorney Generals, their identification with past and present litigation concerning the land within the course of this boundary "dispute" was complete. We, however, notice this one difference since the appearance of the instant Motion to Reject and Dismiss, that there is now engaged on behalf of the State of Mississippi an entire commissioned personnel, and that there now appear no "buck" privates to perform their devoirs for that state, but they now step out of the habiliments of private counsel, and come forth to do battle arrayed in the raiment of Assistant Attorney Generals and holding aloft the mace of authority scatter pontifical expressions. We trust this Honorable Court will inquire into their transposition.

The Mississippi River flows some five hundred miles in its course down the western boundary of Mississippi, from the Tennessee to the Louisiana line. Its course is marked by innumerable twists, turns, bends, cut-offs, old river beds and sloughs, and these sister states instead of asking for a complete re-alignment of the whole boundary line, instead as next friends of these private interests, seek the interposition of this Honorable Court to "tailor the garment to fit the particular needs" of these private interests, in a course of some seven or eight miles.

We here renew the authorities cited in our Motion of Intervention, and Answer of Intervening Co-Defendants.

They file as Exhibit "A" hereto a map in color showing the seven stages of the boundary line through said course, for the periods: 1828-1830; 1863; 1904; 1910; 1916; 1927 and 1942 to the present time; and ask that same be made and taken as a part of this Answer as much so as if copied in full herein.

They file as Exhibit "B" hereto a Map of the Mississippi River Commission dated 1883, showing erroneous superimposed lines unauthorized and undated, and not originally on said map, and ask that same be made and taken as a part of this Answer as much so as if copied in full herein.

They file as Exhibit "C" hereto the original letter of Dabney & Dabney, addressed to Mr. John P. Coleman, Attorney General, of Mississippi, under date of July 10, 1954, and ask that same be made and taken as a part of this Answer as much so as if copied in full herein.

They show further that they are entitled to have their Motion of Intervention sustained and Answer therein filed; or in the alternative that their counsel be permitted to appear therein as *amicus curiae;* and

1. They deny that the States of Mississippi and Louisiana have any legal grounds upon which to pray that the Motion to Intervene should be rejected and denied; but instead show that it should be sustained and accepted; and

2. That said Motion to Reject and Dismiss should be overruled.

The original jurisdiction of the Supreme Court cannot be resorted to in the name of state when suit is in reality for the benefit of particular individuals. Oklahoma ex rel. *Johnson v. Cook*, 304 U. S. 387.

And Chief Justice Hughes in the case *supra* had this to say; in the opinion of the Court relative to this question of original jurisdiction and referring to *Florida v. Mellon*, 273 U. S. 12; *New Hampshire v. Louisiana; New York v. Louisiana*, 108 U. S. 76:

> "To bring a case within that jurisdiction, it is not enough that a state is plaintiff; nor is it enough that a state has acquired the legal title to a cause of action against the defendant, where the recovery is sought for the benefit of another who is the real party in interest. . . .The underlying point was that in determining the scope of this Court's original jurisdiction under Clause 2 of S. 2 of Article 3 of the Constitution, we must look beyond the mere legal title of the complainant state to the cause of action asserted and to the nature of the state's interest."

And these decisions apply with equal force in the instant case.

Respectfully submitted,

ELEANOR R. WOOLGAR AND
IRMA L. RICHARDS,
By L. BRYAN DABNEY, of the law
firm of DABNEY & DABNEY,
of Vicksburg, Mississippi,
Counsel.

CERTIFICATE.

This is to certify that copies of the foregoing answer have been served on the Attorney General of the State of Mississippi, and the Attorney General of the State of Louisiana.

Vicksburg, Mississippi, the 27th day of September, 1954.

L. BRYAN DABNEY, of the law firm of DABNEY & DABNEY, of Vicksburg, Mississippi, Counsel for ELEANOR R. WOOLGAR AND IRMA L. RICHARDS.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 11, Original

THE STATE OF MISSISSIPPI,

Complainant,

vs.

THE STATE OF LOUISIANA,

Defendant

OBJECTIONS OF STATE OF MISSISSIPPI TO MOTION FOR LEAVE TO INTERVENE

The State of Mississippi, herein represented by its Attorney General, asks leave of the Court to file a motion to reject and deny the application, or motion, of certain individuals, to intervene in the above styled and numbered cause.

J. P. COLEMAN,
Attorney General,
State of Mississippi.

GERARD H. BRANDON,
Special Assistant Attorney General,
State of Mississippi.

JAMES D. THAMES,
Special Assistant Attorney General,
State of Mississippi,

CLARENCE CLIFTON,
Associate Attorney,
State of Mississippi.

GERARD H. BRANDON,
Natchez, Miss.

September, 1954.

MOTION

The State of Mississippi appearing herein through its Attorney General, and other undersigned counsel, moves the court to reject and deny the application or motion of Eleanor R. Woolgar and Irma L. Richards, individuals, to intervene in the above styled and numbered cause for the ensuing reasons:

I

This is a suit between the State of Mississippi and the State of Louisiana, two of the Sovereign States of the United States, instituted for the purpose of fixing and establishing the boundary between those two sovereign States within a certain designated area, and instituted within the original jurisdiction of this Court pursuant to Article III, Section II, 2, of the Constitution of the United States of America.

II

No person or persons, public or private, has any right to intervene, or become, a party to this action, or any similar action, brought by one State, in its Sovereign capacity, against another State, in its sovereign capacity, under the terms and provisions of Article III, Section II, 2, of the Constitution of the United States of America.

III

The application to intervene, filed herein, is in direct conflict with, and seeks to contravene, the expressed terms and provisions of the Eleventh Amendment to the Constitution of the United States of America.

WHEREFORE, the State of Mississippi prays that the application made by Eleanor R. Woolgar and Irma L.

Richards to intervene in the above styled and numbered cause be rejected and denied, at the cost of said applicants.

J. P. COLEMAN,
Attorney General,
State of Mississippi.

GERARD H. BRANDON,
Special Assistant Attorney General,
State of Mississippi.

JAMES D. THAMES,
Special Assistant Attorney General,
State of Mississippi.

CLARENCE CLIFTON,
Associate Attorney,
State of Mississippi.

GERARD H. BRANDON,
Natchez, Miss.

September, 1954.

ACCEPTANCE OF SERVICE

The State of Louisiana, herein represented by its Attorney General, hereby accepts service of a copy of the above and foregoing motion, and, with reservation of its right in the above numbered and entitled cause, concedes that the motion filed herein by the State of Mississippi is well taken and should be sustained.

FRED S. LEBLANC,
Attorney General,
State of Louisiana.

JOHN L. MADDEN,
Assistant Attorney General,
State of Louisiana.

September —, 1954.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 11 Original

STATE OF MISSISSIPPI,

Plaintiff,

vs.

STATE OF LOUISIANA

Defendant.

REPORT OF SPECIAL MASTER

D. K. McKAMY,
Special Master.

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REPORT OF SPECIAL MASTER

To the Honorable Chief Justice and Associate Justices of The Supreme Court of the United States of America:

In the above-entitled cause this Honorable Court appointed me as special master by its order dated October 26, 1953, as follows:

> "No. 11, Original. STATE OF MISSISSIPPI, *Plaintiff*, v. STATE OF LOUISIANA.
>
> "October 26, 1953. It is ordered that D. K. McKamy, Esquire, of Birmingham, Alabama, be, and he is hereby, appointed special master in this cause, with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The master is directed to find the facts specially and state separately his conclusions of law thereon, and to submit the same to this Court with all convenient speed, together with a draft of the decree recommended by him. The findings, conclusions,

and recommended decree of the master shall be subject to consideration, revision, or approval by the Court. The master shall be allowed his actual expenses and a reasonable compensation for his services to be fixed hereafter by the Court. The allowances to him, the compensation paid to his stenographic and clerical assistants, and the cost of printing his report shall be charged against and be borne by the parties in such proportion as the Court hereafter may direct. If the appointment herein made of a master is not accepted, or if the place becomes vacant during the recess of the Court, the Chief Justice shall have authority to make a new designation which shall have the same effect as if originally made by the Court herein."

(346 U. S. 862, 98 L. Ed. 60, 74 S. Ct. 102.)

In pursuance of said order, I met counsel for both States in the City of New Orleans, Louisiana, on the 24th day of November, 1953, at which time certain procedures were agreed upon. A second meeting with counsel was held at Vicksburg, Mississippi, on February 2, 1954, at which meeting certain stipulations were entered into and the matter set for hearing of evidence on March 15, 1954. A third conference was held at Birmingham, Alabama, on February 26, 1954, and upon request of attorneys for the State of Louisiana and by agreement of attorneys for the State of Mississippi, the time for beginning testimony was postponed until July 12, 1954, and the place fixed at Vicksburg, Mississippi. A fourth conference with the attorneys was held at Vicksburg, Mississippi, on June 12, 1954, at which time the State of Louisiana entered into the record certain stipulations concerning a portion of the property situated in the Diamond Island portion of the territory in controversy. A further conference was held at Birmingham Alabama, on

July 6, 1954, at which conference additional stipulations were made into the record concerning the Diamond Point area.

On July 12, 1954, at Vicksburg, Mississippi, the hearing was begun for the taking of testimony and continued to and including the 29th day of July, 1954. One day of this period was spent in inspecting the Oak Bend area of the territory in dispute. The taking of oral testimony was closed on July 29, 1954. Leave was granted to the attorneys for the State of Mississippi to file briefs by the 12th day of September, 1954, and to the attorneys for the State of Louisiana to file briefs by the 1st day of October, 1954, and for an oral argument to be heard at a time and place agreed upon after this Court had ruled upon the petition for intervention filed by Eleanor R. Woolgar and Erma L. Richards. The petition was denied on October 14, 1954. 75 S. Ct. 23. Application for rehearing was denied November 22, 1954.

On November 2, 1954, I inspected the territory in the Diamond Island-Diamond Island Towhead area. Oral arguments were made by attorneys for both States at Vicksburg on November 12, 1954. The proof consisted of a large number of exhibits and the oral testimony of fourteen witnesses. The exhibits which were filed as a part of the proof, are numerous and run into a large number of pages. The record of the oral testimony, the exhibits, and the briefs filed in the cause by attorneys for the State of Mississippi and the State of Louisiana have been filed with the Clerk of this Court.

NOW, THEREFORE, In pursuance of the above order of this Court, I herewith submit to the Court my findings of fact, conclusions of law, and recommendations for a decree.

Respectfully submitted,

D. K. McKAMY,
Special Master.

Report of Special Master Together With His Findings of Fact and Conclusions of Law

This is an original action brought by the State of Mississippi against the State of Louisiana for the purpose of having this Court determine the true boundary between the two states at certain points on the Mississippi River, approximately 16 miles below Vicksburg, Mississippi, in the area known as Diamond Island and Diamond Island Towhead and in the area known as Diamond Point. The case involves approximately 25,000 acres of land.

I

Jurisdiction

The jurisdiction of the Court is clear. This is conferred by Article 3, Section 2 of the Constitution, and by Section 1251, Title 28 U. S. C. A.

II

Pleadings

The State of Mississippi brought this suit against the State of Louisiana seeking a decree to determine the true boundary between the states at certain points and confirming the jurisdiction and sovereignty of the State of Mississippi over the described territory.

The State of Louisiana first objected to the filing of the bill of complaint on the basis that there was no dispute between the states as to the boundary. This Court on June 17, 1953, entered an order requiring the State of Louisiana to answer. The State of Louisiana then answered, denying the claims of Mississippi as to jurisdiction over the territory described and asserting, by cross bill, its jurisdicton and sovereignty over the territory in question, and, in addition, set up the claim that it had exercised undisputed possession of the territory for more than half a century, and by adverse

possession and acquiescence of the State of Mississippi it had acquired jurisdiction and sovereignty over such territory. The State of Mississippi filed a reply or replication in which it denied the claims of the State of Louisiana and asserted affirmatively that by adverse possession and acquiescence of the State of Louisiana, for more than half a century, it had acquired jurisdiction and sovereignty over such territory.

This cause has come on to be heard and for determination upon (a) the original bill of complaint of the State of Mississippi, (b) the answer of the State of Louisiana, (c) the reply or replication of the State of Mississippi, and (d) oral and documentary evidence presented at the hearing of this cause before me as the Special Master appointed by this Court to take evidence and to submit to this Court findings of fact, conclusions of law, and recommendations for a final decree.

Since in my findings of fact reference is made to decisions of this Court, I will first state my conclusions of law.

III

Conclusions of Law

Certain principles of law concerning boundaries between states which are based upon navigable rivers are set forth in the decisions of this Court. The following are my conclusions of law based upon these decisions:

1. When a navigable river forms the boundary separating one state from another, in the absence of a special convention between the states, or long use equivalent thereto, the thalweg or middle of the main navigable channel is to be taken as the true boundary line.

Iowa v. *Illinois*, 147 U. S. 1, 13 S. Ct. 239, 37 L. Ed. 55; *Arkansas* v. *Tennessee*, 246 U. S. 158, 38 S. Ct. 301, 62 L. Ed. 638;

Louisiana v. *Mississippi*, 202 U.S. 1, 26 S. Ct. 408, 50 L. Ed. 913;

New Jersey v. *Delaware*, 291 U.S. 361, 54 S. Ct. 407, 78 L. Ed. 847.

2. The thalweg is defined as meaning the middle of the main navigable channel, the track taken by boats in their course down the stream, which is that of the strongest current.

New Jersey v. *Delaware*, 291 U.S. 361, 54 S. Ct. 407, 78 L. Ed. 847;

Iowa v. *Illinois*, 147 U.S. 1, 13 S. Ct. 239, 37 L. Ed. 55;

Louisiana v. *Mississippi*, 202 U.S. 1, 26 S. Ct. 408, 50 L. Ed. 913;

Arkansas v. *Mississippi*, 250 U.S. 39, 39 S. Ct. 422, 63 L. Ed. 832;

Arkansas v. *Tennessee*, 269 U.S. 152, 46 S. Ct. 31, 70 L. Ed. 206.

3. Where the course of the boundary stream changes through the operation of the natural and gradual process of erosion and accretion, the boundary follows the stream and remains the varying center of the channel.

New Orleans v. *United States*, 10 Peters 662;

Nebraska v. *Iowa*, 143 U.S. 359, 12 S. Ct. 396, 36 L. Ed. 186;

Missouri v. *Nebraska*, 196 U.S. 23, 25 Ct. 155, 49 L. Ed. 372;

Arkansas v. *Tennessee*, 246 U.S. 158, 38 S. Ct. 301, 62 L. Ed. 638.

4. When, however, from any cause, natural or artificial, a boundary river suddenly leaves its old channel and seeks a new bed, this sudden and rapid change is termed an

avulsion and the resulting change works no change of boundary, which remains in the middle of the old channel, although no water may be flowing in it, and irrespective of subsequent changes in the new channel.

New Orleans v. *United States*, 10 Peters 662;
Jeffries v. *East Omaha Land Co.*, 134 U.S. 178;
Nebraska v. *Iowa*, 143 U.S. 359, 12 S. Ct. 396, 36 L. Ed. 186;
Missouri v. *Nebraska*, 196 U.S. 23, 25 S. Ct. 155, 49 L. Ed. 372;
Arkansas v. *Tennessee*, 246 U.S. 158, 38 S. Ct. 301, 62 L. Ed. 638;
Louisiana v. *Mississippi*, 282 U.S. 458, 51 S. Ct. 197, 75 L. Ed. 459.

5. In case of an avulsion, so long as the old channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; but when the water becomes stagnant, the effect of these processes is at an end; the boundary then becomes fixed in the middle of the channel (as defined by the Supreme Court) and the gradual filling up of the bed that ensues is not to be treated as an accretion to the shores but as an ultimate effect of the avulsion. The emergence of the land, however, may or may not follow, and it ought not in reason to have any controlling effect upon the location of the boundary line in the old channel.

Arkansas v. *Tennessee*, 246 U.S. 158, 38 S. Ct. 301, 62 L. Ed. 638.

6. The principle of prescription and acquiescence in determining the boundary between states has been sustained and has received repeated recognition by the Supreme Court.

Arkansas v. *Tennessee*, 310 U.S. 563, 60 S. Ct. 1026, 84 L. Ed. 1362;

Rhode Island v. *Massachusetts*, 4 Howard 591, 11 L. Ed. 1116;

Louisiana v. *Mississippi*, 202 U.S. 1, 26 S. Ct. 408, 50 L. Ed. 913;

Virginia v. *Tennessee*, 148 U.S. 503, 13 S. Ct. 728, 37 L. Ed. 537;

Maryland v. *West Virginia*, 217 U.S. 1, 30 S. Ct. 268, 54 L. Ed. 645;

Vermont v. *New Hampshire*, 289 U.S. 593, 53 S. Ct. 708, 77 L. Ed. 1392;

Michigan v. *Wisconsin*, 270 U.S. 295, 46 S. Ct. 290, 70 L. Ed. 595.

7. Where an island is formed in a navigable stream which is the boundary between states, the island belongs to the state situated on the side of the thalweg on which the island is formed.

Kansas v. *Missouri*, 322 U.S. 213, 64 S. Ct. 975, 88 L. Ed. 1234;

City of St. Louis v. *Rutz*, 138 U.S. 226, 34 L. Ed. 911.

8. If an island grows by the addition of alluvion till it reaches the mainland, such new made land will not become the property of the shore owner, but belongs to the owner of the island.

Arkansas v. *Tennessee*, 310 U.S. 563, 60 S. Ct. 1026, 84 L. Ed. 1362.

9. The degree of proof to fix a boundary between states where a channel of river forming the boundary is abandoned is such certainty as is reasonable as a practical matter, having regard to the circumstances.

Arkansas v. *Tennessee*, 269 U.S. 152, 46 S. Ct. 31, 70 L. Ed. 206.

10. Burden of proof is on the State of Mississippi, as the complainant.

Kansas v. *Missouri*, 322 U.S. 213, 88 L. Ed. 1234, 64 S. Ct. 975.

The above conclusions of law were not disputed by the attorneys for either the state of Louisiana or the State of Mississippi in either the oral arguments or in the briefs filed.—

However, there is difference of opinion as to the application of these principles of law to the facts of the case and there is wide difference of opinion as to the proper interpretation of conclusion numbered five. This is a quotation from the opinion in the case of *Arkansas* v. *Tennessee*, 246 U.S. 158, 38 S. Ct. 301, 62 L. Ed. 638.

Attorneys for the State of Louisiana contend that under this decision the boundary does not become fixed after an avulsion until there is no "effective flow" in the old channel. By "effective flow" they mean that if, at any stage of the river from extreme low to high flood, any water flows in the old channel in sufficient amount and force to cause erosion or accretions in the old channel, then the boundary has not become fixed. Under this contention, the boundary is still subject to change in the old channel during periods of extreme flood if any erosion is caused in that channel or any accretions are added.

Attorneys for the State of Mississippi, on the other hand, contend that the quoted language from the opinion of the Supreme Court means that when the old channel has become so filled as no longer to be navigable and certainly when at mean low water no water can enter the old channel, the boundary then becomes fixed in the middle of the old channel and is not altered by later flood waters which may enter the old channel.

I cannot agree with the interpretation placed upon the decision by the attorneys for Louisiana.

I believe that when the old channel has so far deteriorated and become so filled by deposition as that it can no longer be used for navigation except in times of flood, it no longer has a thalweg. When the filling has proceeded to the point that no water can enter the channel at low stages of the river, which are normal during certain periods of the year, there is then no current in the old channel and the water has become stagnant.

When this occurs (while at the same time the river itself remains a wide, deep, swiftly flowing stream capable of navigation at all stages), the old channel is no longer a part of the main river, even though water may flow during a part of the year in the old channel during periods of high water. The old channel is then no more a part of the river than the thousands of sloughs and swales found all up and down the Mississippi River which act as channels to carry flood waters from the river during high stages.

In the case of *Handly's Lessee* v. *Anthony et al.* 5 Wheaton 374, 5 L. Ed. 113, Chief Justice Marshall wrote the opinion.

This was ejectment suit to recover land which the plaintiff claimed under a grant from the State of Kentucky, and which the defendants held under a grant from the United States, as being part of Indiana.

It appears from the recital of facts that the Ohio River after running in a southerly direction for a considerable distance, turned to the north until it approached within less than three miles of the place where the southern course commenced. A short distance above the narrowest part of the neck of land thus formed, a channel, called a bayou, makes out of the Ohio and enters the same river a short distance below the place where it resumes its westward course. This channel is about nine miles by its meanders,

three and a half miles in a straight line, and from four to five poles wide. About midway of this channel two branches empty into it from the northwest one runs along it at low water eastward and the other westward. Between them is ground over which waters of the Ohio do not pass until the river has risen about 10 feet above its lowest stage. It rises from 40 to 50 feet and all of the testimony shows that this channel is made by the waters of the river, not of the creeks which empty into it.

On this state of facts the Court said:

> "If instead of an annual and somewhat irregular rising and falling of the river, it was a daily and almost regular ebbing and flowing of the tide, it would not be doubted that a country bounded by the river would extend to low water mark. This rule has been established by the common consent of mankind. It is founded on common convenience. Even when a state retains its dominion over a river which constitutes the boundary between itself and another state, it would be extremely inconvenient to extend its dominion over the land on the other side, which was left bare by the receding of the water. And this inconvenience is not less where the rising and falling is annual, than where it is diurnal. *Wherever the river is a boundary between states, it is the main, the permanent river, which constitutes that boundary;* and the mind will find itself embarrassed with insurmountable difficulty in attempting to draw any other line than the low water mark." (Emphasis supplied.)

In the case of *State of Iowa v. State of Illinois*, 147 U.S. 1, 37 L. Ed. 55, this Court held that the boundary between states is fixed by the rule of the thalweg, that is the middle of the main navigable channel. The Court quotes with ap-

proval from the case of *Battenuth v. St. Louis Bridge Co.*, 123 Ill. 535, 17 N.W. 439, where it is said:

> "The law as stated by law writers, and in the adjudged cases, seems to be that where a river is declared to be the boundary between states, although it may change imperceptibly from natural causes, the river 'as it runs continues to be the boundary': But if the river should suddenly change its course, or desert the original channel, the rule of law is, the boundary remains in the middle of the deserted river bed. Where a river is the boundary between states, as is the Mississippi between Illinois and Missouri, it is the main, the permanent, river which constitutes the boundary, and not that part which flows in seasons of high water, and is dry at other times. Handly's Lessee v. Anthony, 5 Wheaton 374. In no other way would a river be a permanent fixed boundary, at all times readily ascertainable. There are many cogent reasons why the boundary lines between states should be permanent. Otherwise, territory in one state at one time, sooner or later, might be in another state. It must be in one state all the time, or else the state would lose jurisdiction over it."

It is a well-known fact that at certain times the Mississippi River, as well as other rivers, overflows its banks and spreads over many miles of territory. At such times boats may pass over a wide expanse of territory which is normally dry land. There may be a swift current over such territory, it may destroy houses, uproot trees, wash away quantities of soil, deposit clay, sand and other deposition over wide territories, and yet it cannot well be contended that this territory is thereby made a part of the river and state boundaries changed by such floods.

The facts in the case of *Arkansas* v. *Tennessee*, 246 U.S. 158, 38 S. Ct. 301, 62 L. Ed. 638, are recited in the opinion and in the cases of *Stockley* v. *Cissna*, 119 F. 812; *State* v. *Muncie Pulp Co.*, 119 Tenn. 47; *Stockley* v. *Cissna*, 119 Tenn. 135.

These opinions show that in times of high water the old channel was filled with water over which boats could and did pass. These facts did not affect the decision of this court. It was held that the boundary had become fixed when the water became stagnant at lower stages of the river.

IV

Findings of Fact

There are two distinct tracts of land involved in this case. (1) Diamond Island or Diamond Island Towhead (the terms are used interchangeably throughout the testimony), and this tract will be discussed under Part A of this portion of the report. (2) Diamond Point, which will be discussed under Part B.

Before discussing the testimony and making findings of fact as to these tracts of land, there are certain facts which affect both tracts and are undisputed.

Undisputed Facts

The State of Louisiana was admitted into the Union of the United States of America by Act of Congress, Chapter 50, United States Stat. at Large, Vol. 2, Page 701, approved April 8, 1812, and its boundaries were described in the preamble as follows:

> "Beginning at the mouth of the river Sabine; thence by a line drawn along the middle of said river, including all islands to the 32nd degree of latitude; thence north to the northernmost part of the 33rd degree of

north latitude; thence along said parallel of latitudes to the River Mississippi; thence down said river to the River Iberville; and from thence along the middle of said river to Lakes Maurepas and Pontchartrain to the Gulf of Mexico; thence bounded by said Gulf to the place of beginning * * * etc.

By Act of Congress, Chapter 57, United States Statutes at Large, Vol. 2, Page 708, approved April 14, 1812, additional territory was added to Louisiana, south of the 31st degree of north latitude which is south of the area involved in this suit and is in newise involved here.

The State of Mississippi was admitted into the Union of the United States of America by an Act of Congress, Chapter 23 of the United States Statutes at Large, Vol. 3, Page 348, approved March 1, 1817. The resolution accepting the State of Mississippi into the Union was approved December 10, 1817, Vol. 3, Pages 472-3, United States Statutes at Large, and the boundaries of the State of Mississippi were described therein as follows:

> "Beginning on the River Mississippi, at the point where the southern boundary line of the State of Tennessee strikes the same, thence east along the said boundary line to the Tennessee River; thence by a direct line to the northwest corner of the County of Washington; thence due south to the Gulf of Mexico, thence westwardly including all the islands within six leagues of the shore, to the most eastern junction of Pearl River with Lake Borgne, thence up said river to the 31st degree of north latitude, thence west along said degree of latitude to the Mississippi River, thence up the same to the beginning."

Warren County, State of Mississippi, and Madison Parish, State of Louisiana, are on the Mississippi River between the 33rd and 31st degrees of north latitude.

Thus when the two states were respectively admitted to the Union, the thread of the Mississippi River formed the eastern boundary of Louisiana and the western boundary of Mississippi. Changes in the course of the Mississippi River in the vicinity involved in this litigation have occurred since said states were admitted to the Union and as a result of such changes the land areas known respectively as Diamond Island and Diamond Island Towhead (the terms are used interchangeably throughout the testimony and in this report) and accretions thereto and Diamond Point and accretions thereto have been formed.

A dispute exists between the two sovereign states as a result of such changes in the course of the Mississippi River as to the location of the boundary between said states in the vicinity and area involved in this litigation.

PART A

Pertaining to Diamond Island Towhead Area

The State of Louisiana entered into the record the following stipulation:

> "It is admitted by the State of Louisiana that subsequent to the entry of the States of Louisiana and Mississippi into the Union, a point bar developed from the Mississippi shore, moved in a north and westerly direction from its original position, forming a point bar. That subsiquently a portion, or the tip, of that point bar was cut off and now the remnant of the portion, or tip, remains on the western side of the present channel of the Mississippi River, and that a portion, or a piece, of land on the western side in the vicinity of what is known as Diamond Island Towhead is a part of the State of Mississippi."

Louisiana thus admitted that the entire area known as Diamond Island or Diamond Island Towhead was at one

time a part of the State of Mississippi and that a part thereof described only as "the remnant of the portion, or tip," remains on the western side of the present channel of the Mississippi River and is a part of the State of Mississippi."

The evidence introduced fully justifies the action of the attorneys for Louisiana in making this stipulation. The undisputed evidence showed that opposite the original mainland of Warren County, Mississippi, the land on the right or Louisiana bank of the Mississippi River at Diamond Point was eroded by action of the river over a long period of years and caved into the Mississippi River and disappeared.

Contemporaneously a point bar (Diamond Point Bar) was formed and built by accretions to the Mississippi shore in a northerly and westerly direction until it extended over the entire territory known as Diamond Island or Diamond Island Towhead.

As the Mississippi shore was thus extended by accretions, the thalweg or main navigable channel of the Mississippi River also moved in a northerly and westerly direction; and as the thread of said channel thus moved, the boundary line between the States of Louisiana and Mississippi was also moved in a northerly and westerly direction, remaining at all times at the thread of said channel around Diamond Point Bar to the north, west and south.

Diamond Point Bar continued its progress until about 1864-1866 when the Mississippi River by avulsion cut across the northwestern end of Diamond Point Bar and formed a chute cutoff and thus left the northwestern end of the Bar as an island called Diamond Island or Diamond Island Towhead; but the remainder of Diamond Point Bar remained attached to the mainland of Mississippi.

The approximate date of the formation of the chute cutoff is fixed by the fact that Lloyd's map of 1862, General

U.S. Grant's map of 1863, and Admiral Porter's map of 1864 did not show a chute cutoff, while an official map of the State of Louisiana made in 1866 by Captain J. A. Porter showed that the chute cutoff had been formed (Louisiana Exhibit No. 19 and Complainant's Exhibits 7a and 7b).

The position of the river and its navigable channel before and at the time of the chute cutoff was reconstructed by Dr. H. N. Fisk, a witness for the complainant, and diagramed as his Course "A" upon Plates 4, 5, and 10 of Complainant's Exhibit 4 to Dr. Fisk's testimony. The accuracy of this reconstructed course is attested by the fact that it is for all practical purposes confirmed by Map No. 26 attached to the report of a Reconnaissance Survey of the Mississippi River made by Major Suter, which will be discussed later in this report. I find that the said Reconstructed Course "A" represents the approximate position of the Mississippi River at the time of the formation of the chute cutoff.

The chute cutoff was formed suddenly during a period of high waters and was accordingly an avulsion. The cause and method of its formation is well described by Dr. H. N. Fisk, a witness for complainant (see p. 70 of transcript), and by Mr. Clarence Durham, a witness for defendant (see pp. 888 and 1129 of the transcript), and by Mr. Welder, a witness for defendant (see p. 1301 of transcript).

When the chute cutoff was formed the flow of the river was divided. The main channel of the river continued for a period to flow around to the north and west of Diamond Island, but a part of the flow of the river was directed through the newly formed chute. This chute was entirely within the territorial limits of the State of Mississippi since it had been formed by cutting through the accretions forming Diamond Point Bar, leaving Diamond Island in Mississippi situated on the right bank of the part of the river flowing through the chute and the remaining part of

Diamond Point Bar, still attached to the mainland of Mississippi, on the left bank of the river.

Up to this point the testimony is practically without dispute and it is further without dispute that the chute cutoff later widened and developed until the major portion of the River was diverted into it from the former main channel and that this former main channel to the north and west of Diamond Island was finally closed and abandoned by the River.

The time and method of the final abandonment of this former main channel and what took place thereafter in the chute channel and in the portion of the Diamond Point Bar left after the formation of the Island is in sharp dispute.

The State of Louisiana claims all of the land mass extending from the northeast portion of Bedford Bar (which bar was on the right or Louisiana bank of the Mississippi River prior to the avulsion forming the chute cutoff and is admittedly still in Louisiana), southwardly and eastwardly in front of Diamond Island proper (which was in Mississippi on the left bank of the River prior to the avulsion and which is now on the right bank of the River and admittedly in Mississippi), and westwardly past Diamond Island to a point in the thalweg of the Oak bend channel just north of and directly across from the westernmost tip of Diamond Point. In other words, Louisiana claims all of Diamond Island-Diamond Island Towhead area except the remnant of the island proper. This territory is depicted on various charts of the Mississippi River Commission such as Charts 49 (Smith No. 2, Louisiana No. 16, Fisk No. 5) and 51 (Smith No. 3a, Louisiana No. 27, Fisk No. 7), and Hydrographic Survey 1937-38, U. S. Engineer's Office (Smith No. 4, Louisiana No. 33), Yokena Quadrangle Map of War Department Corps of Engineers (Fisk No. 8, Smith No. 1, Louisiana No. 18a).

The basis for this claim by Louisiana is that after the chute cutoff was formed the River migrated southwardly and westwardly and over a period of more than 80 years eroded all of the land mass in this territory and replaced it with accretions which Louisiana claims were formed to Bedford Bar in Louisiana and claims that none of such accretions were formed to Diamond Island proper or to any territory of the State of Mississippi. This theory is illustrated particularly by Plates 8a, 10 and 11a, Louisiana Exhibit No. 2.

Mississippi admits, and the testimony clearly shows, that all of this territory was eroded by the River over a long period of years as it migrated southwardly and westwardly; but Mississippi claims, and presented evidence to back up its claim, that much of the accretion was formed to Mississippi territory and not to Bedford Bar. Mississippi asserts that the boundary between the states in this territory should be fixed along a line drawn at right angles to the various thalwegs of the river as it migrated southwardly and westwardly, beginning at the point where the flow of the river was divided at the time of the formation of the chute cutoff.

The question then to be decided as to this part of the case is what part, if any, of the accretions which replaced the land mass which was eroded and destroyed by the migrating river after the formation of the chute cutoff were accretions added to the territory of the State of Mississippi.

Since there were no living eye-witnesses who could testify as to the conditions created by the migrating river during this long period of 89 or more years, it is necessary to rely upon maps, charts, aerial photographs, and the testimony of experts who have reconstructed the conditions at various times during that period, based upon their examination of the terrain, their interpretation of accretion scars, and their expert knowledge and experience concerning the Mississippi River.

In support of its position the State of Mississippi, among other witnesses, presented two witnesses as experts, Dr. H. N. Fisk and Mr. Austin B. Smith.

Dr. H. N. Fisk is forty-six years of age. He is at present chief of the Geologic Research Section, Humble Oil and Refining Company, with headquarters at Houston, Texas.

He graduated from the University of Oregon with a bachelor's degree in 1930 and a master's degree in 1931. He received a Ph.D. degree in 1935 from the University of Cincinnati, and served as assistant graduate instructor in geology at the University of Oregon, the University of Cincinnati, and Northwestern University prior to going on the faculty of Louisiana State University in 1935 as an instructor in geology and mineralogy. He left Louisiana State University in 1948 and at that time held the title of Professor of Geology.

He was employed in 1941 by the Mississippi River Commission as expert consultant and retained that position until 1948, and since that time until the present he has been engaged in consulting work for the Mississippi River Commission. His title with the Mississippi River Commission from 1941 to 1948 was that of Consulting Geologist.

At the present time he occupies a position with the Mississippi River Commission [redacted] Board of Consulting Engineers for the Old River Project.

He is a member of various geological societies and served as president of the Society of Economic Paleontologists and Mineralogists in the year 1953.

While engaged as consultant for the Mississippi River Commission it was part of his duties to make a comprehensive geological investigation of the entire alluvial valley of the lower Mississippi River for the purpose of ascertaining from the geological record the factors which were controlling Mississippi River activities. He had working with

him on that project several competent geologists, and in 1944 the Mississippi River Commission published the result of this first work. It was called "A Geological Investigation of the Alluvial Valley of the Lower Mississippi River." In this study an attempt was made, with as complete a record as possible, to show the history of the river and the stages of development of the alluvial valley. This publication was introduced into evidence and marked Exhibit Fisk No. 1.

He is also the author of numerous articles and publications concerning the Mississippi River.

Dr. Fisk was employed in 1944 to make a particularized study of the area involved in this suit in connection with other litigation then pending in the state courts of Mississippi, a report of which is contained in the decision of the Supreme Court of Mississippi in *Sharp & Strickler v. Learned*, 32 Co. 2d 141.

In the present case a copy of the written report made by Dr. Fisk in the state court case was introduced into evidence including a series of pictures and charts which accompanied the report. It is identified as Complainant's Exhibit No. 4 to the testimony of Dr. Fisk. The charts were numbered 1 to 11 inclusive.

Chart No. 1 is an aerial mosaic photograph of the Diamond Island Towhead area made in 1940 which was used as a base map for the charts. On Plate No. 2 he mapped certain traverses and noted the points at which certain photographs included in the report were taken, and placed on the plate the lines of accretions and accretion features found by him on the ground and shown on the aerial photographs.

On Plate 3 are placed the elevations of the land surface from surveys by U. S. Engineers. Also shown are such features as lowlands, lakes, escarpments, gravel deposits, sloughs, etc.

On Plate 4 are shown the mapped river courses. Shown in red is the 1820-30 course; in blue, the 1765 course; in green, the 1882-83 course; in orange, the 1895 course; in yellow, the 1913 course; and the 1933 course is shown on the base map. Also on this Plate 4 Dr. Fisk plotted a Course "A" which was his reconstruction of the course of the River around Diamond Island at an intermediate point between the mapped course of 1820-30 and the mapped course of 1882-3. This Course "A", in the opinion of Dr. Fisk, was the position of the River at the time of the formation of the chute cutoff.

On Plate 5 Dr. Fisk showed in red his opinion, based on maps and accretion scars, of the land which had accreted to what he designated as Bedford Bar in Louisiana between the time of the 1820 mapped course and the reconstructed Course "A". In yellow he mapped the land which, during the same period, had accreted to Diamond Point Bar in the State of Mississippi. This, in Dr. Fisk's opinion, shows the extent of the progression of Diamond Point Bar and shows its position at the time when its northwesterly progression was ended by the formation of the chute cutoff. Shown in green on this Chart 5 was Dr. Fisk's location of the thalweg in the reconstructed Course "A".

Plate 6 shows Dr. Fisk's opinion of the place where the chute cutoff developed and the situation at that time. The position of the Reconstructed Court "A" is shown in purple.

Plate 9 shows the mapped thalweg courses in 1913 and 1932-33 and Dr. Fisk's idea of the thalweg at the time of the Reconstructed Course "A". Shown is the position of the thalweg in each bend with hydrographic information as to the mapped courses.

Plate 10 shows the position of the thalweg of Course "A", shown in purple, when the entire low-water flow was around

to the north and west of Diamond Island and before the chute cutoff, and the thalweg of the 1882-3 mapped course, shown in green, when the entire low-water flow was through the chute cutoff. Also shown in light red is Dr. Fisk's reconstruction of the thalweg marked A_1 and shown in light brown the thalweg marked A_2. The map designations show A_1 to be "divided flow around Diamond Island" and A_2 "main water flow through cutoff."

On this Chart 10 Dr. Fisk placed the letter X on the thalweg A_1 as marking the point where the flow of the current of the river going around the island and through the cutoff was divided. He similarly placed a Y on the thalweg A_2 as marking this point of division, when most of the water was going through the cutoff chute.

On Plates 11 and 10a Dr. Fisk diagramed his opinion as to the location of accretions to Bedford Bar in Louisiana and to Diamond Island in Mississippi. He testified that all of the land mass forming Diamond Island and Diamond Island Towhead which lies west of the present location of the Mississippi River and north of the Oak Bend Reach of the River was eroded by the River subsequent to the formation of the chute cutoff with the exception of the remnant of Diamond Island. This was replaced, according to Dr. Fisk, by accretions formed to the right bank of the Mississippi as it migrated southwardly and westwardly from its position at the time of the formation of the chute cutoff.

The substance of his testimony was that in his opinion, based upon his experience, his examination on the ground, his study of accretion scars, maps, charts and aerial photographs, that all accretions lying to the right of a line drawn from the point Y on Plate 10 at right angles to the various thalwegs shown by the 1882-83, 1895, 1913 and 1932 mapped courses of the river were accretions to the Bedford Bar and therefore to Louisiana, and that all accretions to

the left of such line were accretions to Diamond Island and therefore to the State of Mississippi.

He also placed a designation of Point T at the westerly end of Diamond Island remnant from which a line drawn in a similar manner would show his opinion of the westerly terminus of the accretions to Mississippi.

Dr. Fisk stated that the Point Y was, in his opinion, the point of division of the thalwegs of the river after the formation of the chute cutoff and was the eastern end of a submerged bar attached to the island and extending eastwardly from it and which had caused the division of the thalwegs. This bar came above water as the main channel around to the north and west of the island died, as that channel was abandoned at low water by the River. Accretions were formed to this formerly submerged bar as well as to other portions of the island.

The second expert presented by the State of Mississippi was Mr. Austin B. Smith.

Mr. Smith is forty-nine years of age. He graduated from the University of Arkansas and is a registered civil engineer. He is at the present time the chief of the maintenance branch for the Mississippi River Commission and has been engaged for a total of twenty-five years with the Mississippi River Commission. For seven of those years he was with the Vicksburg District in the field on surveys and dredging on navigation and levee inspection. His initial assignment was on planning in connection with cutoffs and navigation on the lower Mississippi Valley division and its tributaries, remaining with that program until it was completed in 1942. During that period he saw sixteen cutoffs constructed and developed, and was then assigned to the stabilization program on the Mississippi River; working out the initial doctrine upon which that program was based. Since that

time he has been largely on navigation, on dredging, planning, and other related activities, including levee maintenance, and has been in charge since 1940 of those activities.

He served in the United States Army Corps of Engineers as a lieutenant colonel during the war.

In addition to his work with the Mississippi River Commission, since 1940 he has spent a large part of his time studying accretion problems in connection with the past actions and history of the Mississippi River and its relating effects upon erosion, formation of accretions, and changing of channels on the Mississippi River from Memphis, Tennessee, to the Natchez area and on the Arkansas River.

He is a member of a number of engineering societies, including the American Geophysical Union, the American Geographical Society, and the American Society of Civil Engineers.

He has been employed on several occasions to make investigations in connection with suits involving changes of the Mississippi River.

Mr. Smith testified that he had been commissioned by the State of Mississippi to make a study of the Diamond Island Towhead and Diamond Point area. That he began his study by examining certain ancient documents.

These included the 1826-27 land surveys on the Mississippi side of the River; Lloyd's 1862 Edition of Mississippi River Map showing navigation was at that time north of Diamond Island Towhead; U. S. Grant's Map of 1863 which showed no major changes; the 1864 Map of Admiral Porter, showing no major change; the 1866 Louisiana Levee Survey made by Captain J. A. Porter which showed for the first time a chute channel on the south side of Diamond Island. This map was of a controlled survey of the right bank of the river and showed navigation features. It was introduced

in evidence as Complainant's Exhibit No. 7a and 7b, and Louisiana Exhibit No. 19.

Mr. Smith then identified the 1875 Suter report and the supplement published in 1878 which were introduced as Complainant's Exhibits A and B to Smith's testimony. Mr. Smith testified that Major Suter's report was made for the specific purpose of improving navigation and detailed all the islands, the navigation sailing lines, the landings, the miles, sand bars, and other features important to navigation. Map No. 20 accompanying the Suter report was offered in evidence as Complainant's Exhibit No. 8.

Mr. Smith testified that he examined the 1875-85 Annual Report of the United States Lighthouse Board, which showed that the Diamond Island Light was established on March 16, 1877 on the chute channel.

As Exhibit 2 to Smith's testimony there was introduced Mississippi River Commission Chart No. 49, being the 1878-80 survey which showed the hydrography, the overbank elevations, the levees, the navigation lights, the landings, and other features. Mr. Smith testified that he also examined the bank line surveys of 1892, 1895, 1908-09, the 1913-15 Commission charts, the 1932 and 1937 New Orleans District Survey, and he superimposed these on Charts 51 and 52 of the Mississippi River Commission which was introduced as Exhibits 3-A and 3-B to Smith's testimony.

Mr. Smith testified that from his examination of these and other instruments he arrived at certain conclusions which were embodied in his report offered as Exhibit 9 to his testimony. These conclusions were:

(a) The navigation channel was to the north around Diamond Island Towhead until about 1874-75, when the river adopted the chute channel along the south side of Diamond Island Towhead.

(b) The northern boundary of Diamond Island Towhead is marked by the position of the dead thalweg in the abandoned channel and is depicted upon Complainant's Exhibit 2 to Smith's testimony.

(c) Underwater accretions are shown on Chart 49, Smith Exhibit 2, along the east end of Diamond Island Towhead.

(d) The Mississippi River gradually migrated southward and westwardly from its 1875-1881 position along the south side of Diamond Island Towhead. As a result, the Diamond Point area was eroded on the north and extended westward and southward by accretions.

(e) The Diamond Island Towhead area and contiguous lands forming the right bank of the Mississippi River were enlarged by accretions as the river so migrated as shown on Exhibits 3-A and 3-B.

(f) Four points were marked on Smith's Exhibit No. 2 as possible points of the division of the thalweg. Point A, in Mr. Smith's opinion, was the most likely location of the point of division. Point B was the alternate position and Points D and E were extreme positions which he did not think were reasonably defendable as being correct.

(g) In Mr. Smith's opinion, accretions formed to Diamond Island and to an extension from the nose of the island out to the point of division of the thalwegs. Most of this extension was underwater at the time of the 1878-1880 survey, but was built up by deposition after the water ceased to flow in the old channel around the island.

In support of its position the State of Louisiana presented as expert witnesses Mr. Clarence O. Durham, Jr. and Mr. Frank Welder.

Mr. Durham is thirty-three years of age. He is now an Assistant Professor of Geology at Louisiana State University at Baton Rouge, Louisiana. He holds a bachelor's degree in geology from the University of Texas in 1942. He

received a professional certificate in meteorology from the University of Chicago in 1943. In addition, he has done graduate work in geology at the University of Texas and at Columbia University. During World War II he was a weather forecaster for the Army Air Forces in the Caribbean and in South America. During the war period he received additional training in tropical meteorology at the University of Puerto Rico and was in charge of a research unit for training weather forecasters and had experience in interpreting aerial photographs and was awarded a rating of photo observer by the Air Force. He holds a commission as major in the Reserve Corps.

After the war he was a teaching Fellow at the University of Texas for one year and an instructor in geology for one year. For the past three years he has taught geology at Louisiana State University and has served as reserve geologist for the Bureau of Economic Geology at Austin, Texas. He has also taught geology field courses during the summer.

Mr. Frank Welder is thirty-one years old and lives in Baton Rouge, Louisiana. He graduated from the University of Texas with a degree of bachelor of science in geology in 1949. He obtained a master's degree in geology from Louisiana State University in 1951. He is now working for a doctor's degree in geology at Louisiana State University and expects to obtain such degree in June of 1955.

In connection with his work toward his doctor's degree, he has done research work since the summer of 1951 as a Research Assistant on a project for the Naval Reserve in the delta of the Mississippi River from New Orleans southward chiefly within the limits of Plaquemines Parish, and has been a teaching assistant at Louisiana State University for the past year.

Much of the testimony of these witnesses and the main basis of their conclusions concerning the action of the Mississippi River in the Diamond Island and Diamond Island Towhead area was based upon a theory developed by Mr. Welder concerning a pattern of the closing of channels which are being abandoned by the River.

While working in the delta of the Mississippi River from New Orleans southward in connection with the main thesis which he is to write before obtaining his Ph.D., Mr. Welder developed a theory that the River closes a channel that is being abandoned according to a definite pattern. This theory is summarized in Louisiana's brief as follows:

1. Development of a sand bar along the inside upstream bank of the channel being abandoned;

2. Development of a meander pattern of greater curvature within the closing channel;

3. Erosion and consequent retreat of the head of the opposite shore.

When Mr. Welder was employed to assist Mr. Durham in his investigation of the Diamond Island area, he explained to Mr. Durham the new theory of channel closing which he had developed. Mr. Durham apparently agreed with the new theory.

Although Mr. Welder testified that the conditions of soil, alignment of the river and speed of the current of the river in the Vicksburg vicinity are entirely different from those in the lower delta region, and further that there are no publications in the literature concerning the actions of the Mississippi River authenticating such a pattern of channel closing, this theory was adopted as the basis for the investigation of the areas in dispute.

Mr. Durham spent approximately five days over a period of several months in the Diamond Island vicinity and about seven days in the Diamond Point area making his investi-

gations, and Mr. Welder approximately the same length of time and made certain borings in the vicinity of the head of Diamond Island.

Mr. Durham and Mr. Welder prepared a series of charts which were introduced in evidence as Louisiana Exhibit No. 2. These charts, together with certain charts prepared by Mr. Welder in the course of his work in the lower delta area, demonstrate the new theory of channel closing.

As applied to the closing of the channel around to the north and west of Diamond Island, Mr. Durham testified that they demonstrate that a bar was formed from the right bank of the river upstream from the head of the old channel and connected to Bedford Bar located in Louisiana. That this bar advanced downstream and was the effective force which finally closed the channel. That in the meantime the head of Diamond Island and any underwater bar attached to that island to the point of division of the flow of the river was eroded back and destroyed by the river, all of which action was exactly what was to be expected under the new theory of channel closing.

During the course of the trial at Vicksburg, a set of maps and charts were introduced. Those maps and photographs concerned chute cutoffs at various points on the River. Mr. Durham apparently had never examined these charts prior to that time, but he felt that some of them supported his theory of channel closing. While admitting that he had never visited any of the locations and did not know whether the cutoffs were natural or artificial, he testified that the maps demonstrated the correctness of his theory of a definite pattern of channel closing. This portion of his testimony consumed many pages of the record and took up approximately the same amount of time as the testimony concerning Diamond Island area itself.

While Mr. Durham and Mr. Welder may be correct in their theory of channel closing, and I am sure they were

perfectly sincere in their testimony, I believe that the only thing proved by this evidence is that the method used by the Mississippi River in closing channels which it is abandoning is largely controlled by the soil, the alignment of the river, the speed of the current, and other factors present at the particular locality.

This is well demonstrated by one of the examples cited by Mr. Durham, Natchez Island. This is the closest chute to Diamond Island of any of the examples cited. In this case instead of the head of the island and the underwater bar attached thereto eroding and being destroyed, there was deposited on it sediment and accretions extending it upstream. No bar was formed to the inside upstream bank to cause a closing of the channel. Mr. Durham's testimony concerning Natchez Island appears in the record, Transcript pp. 971-979, and Mr. Smith also testified concerning it on Pages 1434-39, Transcript.

Applying his theory of a definite pattern of channel closing to the Diamond Island situation and demonstrating by numerous maps, charts, diagrams, and interpretations of aerial photographs, Mr. Durham testified that in his opinion the entire area embraced in the Diamond Island and Diamond Island Towhead, except the remnant island, is composed of accretions to Bedford Bar in Louisiana. He testified that in his opinion there were no accretions to Diamond Island proper and therefore none to the State of Mississippi.

In substance, his testimony is that a bar built out from Bedford Bar closing the channel around to the north and west of Diamond Island. That thereafter as the River migrated southwardly and westwardly it eroded all of this territory and replaced it with accretions formed by bars joined to Bedford Bar and running completely around Diamond Island to the east, south and southwest all the

way to Oak Bend on the south and Palmyra Lake to the west.

Mr. Welder loyally supported his colleague's testimony concerning the formation of the bars to Bedford Bar. However, he did not go all the way with him in discounting the possibility of there being some accretions to Diamond Island itself.

Referring to Plate 10-A of Exhibit 4 to the testimony of Dr. Fisk, Mr. Welder testified:

> "If you can remember now the small strip which was all that remained of the original point, it is, in my mind, rather difficult to consider that all the area in blue was formed by accretion to that small strip of land. It might have happened, but I do not think so. As I have said, the bars trend to the northwest and the west in the vicinity of Diamond Island Towhead on Plate 10-A. None of these bars is attached to the south side of Diamond Island. The bar immediately south of Diamond Island, as you have seen on the survey by the Louisiana Department of Public Works, is attached to the right, what had been the right bank, of the Mississippi River, a short distance east of Diamond Island. Now I can't deny that sediment has been deposited all around Diamond Island. It's obvious that it has, but—well, that is my geological interpretation of it."

Both Mr. Durham and Mr. Welder disclaimed any knowledge as to navigation. They did not connect a thalweg in any way with navigation. In their viewpoint, every stream, large or small, has a thalweg so long as at any stage of the river there is a current running.

Dr. Durham, as appears from his testimony on Pages 1255 to 1266, admitted that there could be deposition to

the underwater bar which would bring it above water. His idea was that this would not occur until the thalweg of the closing channel, north of the underwater bar, had in his words "passed over the bar." That all accretions were then to the right bank of the river which, in his opinion, would be accretions to Louisiana.

In this Mr. Durham seems to ignore the fact that the chute channel was entirely within the State of Mississippi and that for the entire length of Diamond Island, including any bar attached to the head of the island, the right bank of the river was Mississippi territory. In addition, as I envision the situation, the thalweg in the closing channel, north of the submerged bar, did not cross over anything. As the channel closed and no water flowed north of the formerly submerged bar that thalweg simply ceased to exist. The only thalweg left was through the chute channel. As this role remaining thalweg migrated south and west it eroded the left bank of the chute channel and accretions formed to the right bank, including the formerly submerged bar.

This is the situation testified to by Dr. Fisk and by Mr. Austin Smith.

As stated by Chief Justice Taft in his decision in the case of *State of North Dakota v. State of Minnesota*, 263 U.S. 365, 44 S. Ct. 138, 68 L. Ed 342:

> "It is difficult for a court to decide issues of fact upon which experts equal in number and standing differ flatly, and when their conclusions rest on estimates upon the correctness of which the court, without technical knowledge, cannot undertake to pass. In such cases, the court looks about for outstanding facts from which the lay mind can safely draw inferences as to the probabilities. The court is also aided by its judgment of the care and accuracy with which the con-

trasted experts respectively have determined the data upon which they base their conclusions. . . ."

While I have great respect for the ability and the sincerity of the experts presented by Louisiana, I cannot agree with them that no part of the very large mass of accretions in this area were formed to Mississippi territory. These gentlemen were intelligent, articulate, enthusiastic, and undoubtedly most sincere. However, they were comparatively inexperienced concerning the actions of the Mississippi River and I cannot help but feel that they were rather carried away with their enthusiasm for the newly developed theory as to channel closing when they reached the conclusion that none of the accretions were formed to Mississippi territory.

While stoutly backing up the testimony of its expert witnesses, the attorneys for Louisiana offer an alternative argument. Under this argument, it is admitted that there were some accretions to Diamond Island. Louisiana Exhibit 43 Plate 2 is a map prepared by engineers for Louisiana and suggesting that the accretions shown in orange on this map were accretions to Mississippi territory and the remaining territory shown on this map were accretions to Louisiana territory. The lines are shown at right angles to the low water banks of the various charted courses beginning at a point on the 1882-3 chart just below the head of Diamond Island remnant on the right and at a point marked C on the left at the westerly extremity of the remnant.

Concerning this alternative argument, it is stated in the brief for Louisiana, beginning on Page 29, as follows:

"Louisiana, under the alternative that the court might hold that these bars, or some of them, were accretions, not only to Louisiana where they were attached,

but also were to the island when south of it, then makes the following argument, viz.: It appears that both states are content to urge the same legal principle as to division of accretions (provided there were accretions actually formed to the island remnant itself).

"This legal principle is that accretions should be divided at right angles to the new bank of the river in front of each successive bar. Mississippi says to the thalweg of the new river, but this is of no real importance.

"Louisiana then contends, that the entrance to the channel around the island as the water last ceased to flow therein, *as the same has been surveyed and hereinabove discussed;* would then be the boundary between the two states at that point, and that any accretions to the two states in the area of that boundary, would be divided on this right angle principle. The same argument would apply to the channel at the western end of the island, which can readily be located and surveyed.

"How this division could be made is graphically shown on Louisiana exhibit No. 43, Plate 2. Such division lines are capable of being mapped and surveyed on the ground.

"We submit then, that such is a proper division of accretions, in the event it is held that any of these accretions formed to the island."

My conclusion that some part of these accretions were formed to Mississippi territory and some part to Louisiana territory is based not only upon the testimony of the very able and experienced experts presented by Mississippi but is buttressed by the testimony of Captain Wm. H. Read, 82 years old, a former steamboat captain who had lived all of his life in the neighborhood. He had sailed boats on

the Mississippi in the neighborhood of Diamond Island and Diamond Point for many years since the early 1890's. He had been in charge of cruising timber on the accretions; of making surveys and making lines and of acting as manager for persons claiming to own the land. He testified, on Page 472 of the Record, that he had seen the accretions, over the years, formed to the remnant of Diamond Island in a southerly and easterly direction. He further testified, beginning on Page 48 of the transcript, as follows:

"Q. Where is that gravel pit, with reference to the head of the island in the location of Diamond Benchmark?

"A. Just to the east of the head of the island and on the head of the island—not on the main shore but under the shelving bank.

"Q. Under the shelving bank?

"A. Yes, sir.

"Q. How far, to your personal observation, have you seen that gravel bar extending east of there?

"A. On up to the white line; on up into the Bedford property.

"Q. A gravel deposit, is that right, sir?

"A. Yes, sir.

"Q. What size gravel is it?

"A. Just ordinary rocks; not very large; medium sized rocks; about hen egg would be about the largest.

"Q. Ordinary river run gravel, is that right or not?

"A. Well, I don't know what we'd call river run gravel.

"Q. I am trying to get at some term.

"A. It's about the usual size of gravel that deposits on mostly islands, especially on the head of them.

"Q. Have you seen that formation at the heads of

other islands or heads of other towheads where you have a divided flow of water going on either side of the island or towhead, Captain?

"A. Yes, sir, we have a splendid case of that right here, almost inside of Vicksburg, Race Track Island. The river went both ways there and finally went through the chute and left the old channel and on the head of that island and upstream it built sand and gravel.

"Q. Between the divided channels or flow of the river?

"A. Where the channel divided, the island built upstream.

"Q. Is it usual or unusual, where you have a divided channel and island or cutoff towhead, for that formation that is between the two divided channels to build accretions, gravels and sand and other accretions, to build upstream?

"A. Usually.

"Q. It is usual?

"A. Very unusual to do otherwise.

"Q. It is unusual to do otherwise?

"A. Yes, sir. Now, we have another case down there at Ursina where there was a towhead made on Big Black Bar River; it went both ways and the accretions built on upstream with sand and gravel and both these cases I mentioned, Vicksburg people have dug gravel off them towheads."

Others, including Mr. Spencer, a lawyer living in Tallulah, Louisiana, who was formerly the owner of certain of the accretions in the Diamond Island area, and L. C. Dunmore, who had lived on a part of this land for many years, testified that part of the accretions were known in the community as being in Louisiana and part in Mississippi.

Many deeds were made conveying portions of this property as being in Mississippi and others in Louisiana. Parts of it were assessed for many years for taxes in Mississippi and parts in Louisiana.

A number of law suits were filed and decrees rendered on the theory that part of the accretions were located in the State of Mississippi. The Supreme Court of Mississippi in the case referred to *Sharp & Stricker* v. *Learned*, 32 So. 2d 141, held that a large part of the accretions were located in the State of Mississippi. While none of this testimony is conclusive of the location of the state boundary line and is not binding upon the State of Louisiana, it is persuasive, when taken in connection with the expert testimony, that a part of the accretions were located in each State.

I therefore find that a part of the accretions in the Diamond Island area are in Louisiana and part in Mississippi, and that the boundary between the States should be fixed on a line drawn at right angles to the thalwegs of the charted courses beginning at the point where the current of the River was divided at the time the current ceased to flow in the channel around to the north and west of Diamond Island at low water and the water in such channel became stagnant.

The most difficult question to be determined in this case, to my mind, is the location of the division point of the thalwegs at the time the chute was formed. Dr. Fisk fixes the most likely point at the location of Point Y marked on Plate 10 of Exhibit 4 to his testimony. He fixes an alternate point marked by the letter X on this same Plate 10.

Mr. Austin B. Smith testified that in his opinion the point should be fixed at the place marked A on Exhibit 5 to his testimony, but also located other possible points marked by the letters B, D, and E.

Louisiana has suggested if it is determined that part of

the accretions were to Mississippi and part to Louisiana, that the point to begin the division of the accretions should be located at a point near the head of the island as marked on Louisiana Exhibit No. 43, Plate 2.

Major Charles R. Suter made a reconnaissance survey of the river in 1874 pursuant to an Act of Congress approved June 23, 1874, Chapter 457, 18 Statutes at Large 237, 242, providing for the improvement of certain transportation routes to the seaboard. Major Suter was assigned to make an examination of the Mississippi River from Cairo to the Gulf. His party had a government steamboat and, in performance of the work, passed over the river in this vicinity twice. The courses of the channel were taken by compass. Distances were determined by the speed of the boat. Widths of the river were estimated, and to some extent these estimates were checked by triangulation.

The purpose was to ascertain the appearance of the river and to get a general idea of the shape and location of the channel. No survey by actual measurements was made and accuracy was not attained.

His report was published in Part II of the 1875 Annual Report and a supplementary section was published in Part II of the 1878 Annual Report of the Chief of Engineers. Copies of the reports were introduced in evidence as Exhibits A and B to Smith's testimony.

On Page 548 of the 1875 Annual Report Major Suter states:

> "The effect of very extensive bank-abrasion was well shown last summer, in the harbor of Vicksburg, Miss. After the subsidence of the great flood of 1874, the shore of the [illegible] opposite Vicksburg caved in to an enormous extent. The sand thus precipitated into the river was washed down into the bend below, and the crossing from Vicksburg to delta, which usually is over

20 feet deep, was shoaled to 8 feet. It is supposed that the next high water will remove this shoal, and it is only mentioned to show what very extensive and far-reaching effects may be produced by causes which at first sight may appear to be purely local. At the same time the bend of Diamond Island, sixteen miles below Vicksburg, filled up, and the channel established itself permanently in the chute. This change was also probably due to the excessive bank erosion at Vicksburg."

The report of Major Suter was accompanied by the Suter charts. Map 20 shows the situation at Diamond Island as found by him in 1874. Several copies were introduced, one being Complainant's Exhibit No. 8. It shows the chute cutoff and locates the point of division of the thalwegs going around the Island and through the chute cutoff.

The point which Major Suter showed on his Map No. 20 as the point where the thalwegs divided has been placed by Mr. Smith on Exhibit 5 to his testimony marked by the letter S.

The burden of proof as to the boundary is on the State of Mississippi as the complainant. The measure of proof, however, is as stated by this Court in the case of *Arkansas v. Tennessee*, 269 U. S. 152, 46 S. Ct. 31, 70 L. Ed. 206, "such certainty as is reasonable as a practical matter, having regard to the circumstances." The Suter report and maps are discussed in this opinion. This burden, in my opinion, has been met. Major Suter's report may be said to be the only testimony by an eye-witness. He was on a mission for the Government in connection with navigation. He was on the ground and certainly had the opportunity to know the exact spot where the current divided, and the location of the place where the currents were flowing was one of the main objects of his visit to this vicinity. He stated that the old channel was filled at that time. I do not believe that the

head of the submerged bar, connected with the island and which was the cause of the division of the current, was eroded back after that time. I therefore find that the Point S as shown on Exhibit 5 to Smith's testimony is the point to begin the division of the accretions.

I do not believe that further discussion of the evidence in this report will serve any good purpose and I will therefore summarize my findings of fact concerning Part A below.

During the hearing at Vicksburg ruling on certain objections to certain testimony was reserved. All of these objections are overruled (except as limited at the time the objection was made) with the exception of objections to the testimony of Dr. Fisk in a previous case. These objections are sustained and the testimony has not been considered.

Claims to Diamond Island and Towhead by Prescription and Acquiescence

In its answer to the [redacted] complaint Louisiana asserted title to the lands lying [redacted] Diamond Island and Diamond Island Towhead area by prescription and acquiescence on the part of Mississippi to the claim of Louisiana and that Mississippi is therefore estopped from asserting any claims to said land.

Mississippi in a reply to the answer filed by Louisiana denied that Louisiana had acquired title to the lands by prescription and that Mississippi had acquiesced in such claims by Louisiana, and further averred that for more than 50 years Mississippi had asserted ownership over such lands and had acquired title thereto by prescription and acquiescence by Louisiana.

In my opinion, the evidence falls far short of that degree of proof necessary to show that either State has acquired title to the lands by prescription or that either State has acquiesced in the claim of the other.

Many deeds to portions of the land were introduced into evidence, some describing the land as situated in Mississippi and others as situated in Louisiana. Records were introduced showing that portions of the land were assessed for taxes in Louisiana and others in Mississippi. In instances the same persons assessed the land in both States. Evidence from persons claiming to own the land was to the effect that they bought titles from persons claiming under Louisiana and to the same land from other persons claiming titles under Mississippi because no one knew in which State the land was situated. Hotly contested law suits were filed in both States claiming the land to be situated in one state or the other.

The evidence shows and I so find that possession was "scrambled" and that neither State has acquiesced in the claim of the other.

Summary of Findings of Fact as to Diamond Island

1. A point bar (Diamond Island Point Bar) was formed and built by erosion of the territory of Louisiana on the right bank of the Mississippi River and by accretion to the mainland of Warren County, Mississippi, in a northerly and westerly direction, over a long period of years. As the point bar thus moved the thalweg or main navigable channel of the River, forming the boundary between Louisiana and Mississippi, also moved in a northerly and westerly direction until it reached a position about 1864 around to the north and west of what is now called Diamond Island.

2. Sometime between the year 1864 and the year 1866 the River by an avulsion during a period of high water cut across the point bar and formed a chute cutoff, leaving the northwest end of the point bar an island, thereafter known as Diamond Island, but with the main channel of the River still flowing around the island to the north and west thereof.

3. After the chute cutoff was formed it developed and widened until the major portion of the flow of the River was diverted into it and the former main channel around the island ceased to be navigable and was filled by deposition of gravel, sands, clays, silt and other materials. The current ceased to flow in this channel and the water became stagnant except in periods of high water by at least the period 1878-80.

4. The hydrographic survey of the Mississippi River of the date 1882 shows the channel around Diamond Island to be closed and to be filled to an elevation of 15 to 20 feet above mean low water. Charts 49 and 50, Complainant's Exhibit 10; Smith's testimony, Tr. pp. 707-717; and Fisk's testimony, Tr. p. 95.

5. The flow of the River was divided when the chute channel was formed and one branch of the thalweg continued in the channel around the island until that channel was filled and abandoned. The other branch of the channel was diverted into the chute cutoff and became the sole thalweg of the River when the old channel was abandoned. The division of the flow was caused by a submerged bar attached to the head of the island and extended upstream into the River to the point of the divided thalweg. This point of division is shown on Map 20 of Major Suter and is fixed as Point S on Exhibit 5 to Austin B. Smith's testimony.

6. When the old channel was abandoned the submerged bar came above water by deposition deposited upon it and formed a part of Diamond Island from the head of that island to the point of division of the current represented by Point S as marked on Exhibit 5 to the testimony of Austin B. Smith. This bar of gravel, sands and other material was attached to the part of the upper end of said Diamond Island Towhead between the original main channel of the Mississippi River and the main channel of the chute

cutoff course and evidence of this point of diversion is yet in existence by the deposition of gravel shown on temporary charts of the United States Engineers and of the Mississippi River Commission, observation of witnesses, photographs and borings, and is evident from an inspection of the premises; and since said gravel deposit is yet in existence, it is found that same was never eroded, washed away or destroyed. See Chart 49, Mississippi River Commission, 1882, Complainant's Map Exhibit 10; Report of Dr. H. N. Fisk and photographs therein contained, Complainant's Fisk Exhibit No. 4; Testimony of Dr. H. N. Fisk, Tr. 77-82, 164, 167, 182, 190, 297; Testimony of Captain William H. Reed, Tr. 483-485, 516-517; Testimony of Austin B. Smith, Tr. 865-868, 873, and Complainant's Smith Exhibit No. 10; the Suter Map No. 20, Complainant's Exhibit No. 8, and interpretation thereof, testimony of Mr. Smith, Tr. 876-877; Testimony of Mr. Clarence O. Durham, Jr., Tr. 948-959, 971, et seq. 1142, 1239, et seq.; Testimony of Mr. Frank Welder, Tr. 1323, 1328, 1349, et seq.

7. The boundary between the States of Louisiana and Mississippi in the old channel was not changed by the avulsion and was fixed from Point S around the Island to the north and west at the position of the thalweg in that channel when the current ceased to flow therein and the water became stagnant by at least the period 1878-80.

8. As Diamond Island Point Bar, subsequent to the occurrence of the avulsion and chute cutoff, continued to build downstream and westwardly by the gradual process of erosion and accretions, the flow of the waters through the chute cutoff eroded, caved in and washed away portions of the southerly side of Diamond Island Towhead, particularly off of the southwest end of same. While erosion was occurring by impingement of the current against Diamond

Island Towhead at the westerly end thereof at the same time erosion was taking away portions of the Louisiana mainland to the west and southwest of the westerly end of Diamond Island Towhead. The maximum extent of this erosion of the west end of the Island is at that point in the thalweg of the original old and abandoned channel of the Mississippi River around Diamond Island Towhead (situated between Diamond Island Towhead and the Louisiana mainland at the west end of Diamond Island Towhead) which has been denoted as Point C at the westerly end of Diamond Island Towhead on Complainant's Exhibit 5 to the testimony of Mr. Austin B. Smith.

9. In accordance with the legal principle concerning division of accretions urged by both the State of Mississippi and the State of Louisiana, I find that the boundary between the two States in the Diamond Island-Diamond Island Towhead area on the east should be fixed by beginning at the Point S as located on Exhibit 5 to the testimony of Austin B. Smith and extending across the accretions at right angles to the successive thalwegs along the line from Point S to Point S_1, Point S_2, Point S_3, Point S_4 to Point S_5; all as shown on said Exhibit 5 to the testimony of Austin B. Smith, and on the west should be extended across the accretions beginning at the Point C and along the line to Point C_1, Point C_2 and Point C_3, as shown on said Exhibit 5 to the testimony of Austin B. Smith. The points, according to the testimony, can be easily located upon the ground and an accurate description prepared by Mr. Austin B. Smith, a competent engineer, is set forth below in this report.

10. I do not find that there is sufficient evidence to show that either the State of Louisiana or the State of Mississippi has acquired title to the Diamond Island-Diamond Island Towhead area by prescription and acquiescence of the other State.

Part B

Diamond Point

The State of Louisiana by direct authority of its Attorney General entered into the record a stipulation which reads as follows:

> "Pursuant to authority of letter from Hon. Fred S. LeBlanc, Attorney General of the State of Louisiana, dated July 2, 1954, copy of which is annexed hereto, the State of Louisiana by E. H. Lancaster and Ashton L. Stewart, Special Assistant Attorneys General, admits the area known as Diamond Point is not located within the State of Louisiana and Louisiana does not deny that this area is located in the State of Mississippi." (Tr. p. 8)

This was in addition to the stipulation discussed under Part A concerning the formation of Diamond Point Bar and development of the chute cutoff.

While the stipulation does not contain any specific description of the land known as Diamond Point thus disclaimed by the State of Louisiana, it was made clear by the evidence and by the arguments and briefs of her attorneys that the only portions of the Diamond Point area to which Louisiana makes any claim are:

> (a) An island which formed near the southern boundary of Diamond Point in what is referred to in the testimony as the Kellogg Lake channel of the River;
>
> (b) A strip of territory along the northern boundary of Diamond Point in the Oak Bend channel at a point where Louisiana asserts that the River had migrated southwardly approximately ¼ of a mile after the current ceased to flow through this channel at low water during the year 1940.

In addition to the stipulations, the evidence is clear and without contradiction that all of the land in the Diamond Point area except that part listed above under (a) and (b) is situated in the State of Mississippi, and I so find.

Diamond Point Bar was formed, as discussed under Part A of this report, by accretions to the mainland of Mississippi in Warren County, Mississippi. After the chute cutoff developed cutting off the northwestern end of the Bar, the Mississippi River continued to erode the Louisiana shore opposite the westerly and southerly side of Diamond Point until in 1904 it caved into an old channel known as Palmyra Lake left by Davis Island cutoff of 1867. This caving of Louisiana shore into Palmyra Lake is often referred to as Killakranka Cutoff.

After this break-through, the flow of the Mississippi River was divided and a part thereafter went downstream through Palmyra Lake to the west and south of Davis Island situated in Mississippi (but not involved in this case). Part continued to flow eastwardly in the channel along the southerly side of Diamond Point. This eastwardly flowing reach of the Mississippi River is sometimes known as Kellogg Lake. As a result of the reduced flow, the Kellogg Lake channel gradually filled and was in the process of closing and being abandoned as a channel of navigation at the time of the construction of Diamond Cutoff across the base of Diamond Point in 1933.

In 1933 the United States Corps of Engineers, acting under the direction of the Mississippi River Commission, completed an artificial cutoff for the improvement of navigation across the face of Diamond Point, which cutoff is known as Diamond Cutoff. In the course of the construction of this artificial cutoff large quantities of dredged material were pumped into the bed of the River channel on the south side of Diamond Point, near the lower end of Diamond

Cutoff. After completion of the cutoff a fill was placed across the old Kellogg Lake channel thereby finally closing it.

The southern boundary of Diamond Point in Mississippi and the northern boundary of Sargent Point in Madison Parish, Louisiana was the middle of the thalweg in the Kellogg Lake reach of the River. The construction of the Diamond cutoff, being an artificial avulsion, did not alter or change the boundary between the two states, and said boundary became fixed when the current ceased to flow and the water became stagnant in the Kellogg Lake reach of the Mississippi River.

As to the disputed territory listed under (a) above, the evidence was as follows:

As stated, the Kellogg Lake channel of the River which forms the southern boundary of Diamond Point started to deteriorate and the flow to slacken after the formation of Killakranka Cutoff prior to 1913, As a result, some islands were formed in this channel of the River.

The 1913 Chart; Louisiana Exhibit 27, did not show the existence of the island in dispute nor did it appear on the chart for 1920, Louisiana Exhibit 28. It did appear for the first time on the 1925 Map (Louisiana Exhibits No. 26 and 26-A). At that time it is shown to be north of the main thalweg of the Mississippi River and therefore on the Mississippi side of the main thalweg. It is shown at that time to be separated from the mainland of Mississippi by a channel containing a lesser flow than the channel to the south of the island. By 1930 the island was attached by accretions to the left bank or Mississippi side of the River. Mr. Durham, a witness for Louisiana, described the formation of the island from the various maps and charts. There were no eye-witnesses to testify in reference to the island. Mr. Durham's testimony shows that from the only available

maps and hydrographic surveys the island is shown to be north of the main thalweg of the River.

Dr. H. N. Fisk testified that he made a detailed study of this area and that in his opinion the island was formed north of the thalweg of the River.

This being the only evidence concerning the formation and location of the island and all of the maps and charts showing the island to lie north of the thalweg of the River and on the Mississippi side of the River, I find that the island is located within the territory of Mississippi and that the boundary between the States should be drawn south of the island at the location of the thalweg when the current ceased to flow in this channel and the water became stagnant as a result of the abandonment of the channel by the River.

As to the territory in dispute under the designation (b) above, the evidence shows:

The artificial cutoff called Diamond Cutoff was constructed by the U. S. Engineers in 1932-33 beginning at approximately the location of the Oak Bend channel of the River, which was the then northern boundary of Diamond Point and the southern boundary of the Diamond Island-Diamond Island Towhead area.

Diamond Cutoff widened and deepened and by 1935 a large portion of the flow of the River was through the cutoff. Navigation ceased to be directed through the Oak Bend channel by 1936 and navigation lights and bouys were removed. In 1939 and again in 1940 no water flowed through the Oak Bend channel at low water and the entire low-water flow was through the cutoff.

At times of high water there was a flow of water in Oak Bend and may be at this time. When I visited the Oak Bend region in July, 1954, the bank was some 20 feet above

the water in the river. There was a large expanse of sand in the old channel containing some vegetation. There was no water, except in certain low places where there was some stagnant water.

At that time the river going through the cutoff was deep, the current swift, and large boats carrying commerce were moving on the river.

It is my opinion, as stated in Conclusions of Law Number 5, that the boundary became fixed in the middle of the thalweg of this channel as a result of the artificial avulsion caused by Diamond Cutoff when current ceased to flow in the Oak Bend channel by at least 1940. Navigation could not use the channel at that time, the water was stagnant in the old channel except in times of high water. It was no longer a part of the main river which continued to flow at all stages with a swift current through the cutoff carrying the commerce of the river.

While it is true that there has been some erosion by high water flow in the channel since 1940 to the extent of probably ⅓ of a mile, I do not think that this has caused any change in the State boundary but is merely an effect of the avulsion.

Prescription

In view of the above findings, I do not think it is necessary to discuss in detail the evidence as to the claim of Mississippi to title by prescription and acquiescence in such claim by Louisiana. Suffice it to say that from the uncontradicted evidence I find that the State of Mississippi at all times for more than fifty years exercised jurisdiction and sovereignty over the body of land known as Diamond Point. This record discloses no assertion by the State of Louisiana, prior to the institution of this suit, of any claim to such land.

Summary of Findings of Fact as to Diamond Point

1. I find, based upon the admissions of the State of Louisiana and upon the evidence, that Diamond Point is located in the State of Mississippi, and that the correct boundary between the States of Mississippi and Louisiana in the Diamond Point area is as described in the next part of this report.

2. I find that under the doctrine of prescription the State of Mississippi has acquired title to the area known as Diamond Point and that its claim thereto has been acquiesced in by the State of Louisiana over a long period of time.

V

State Boundary

On the basis of all of the foregoing, the state boundaries involved in this suit are found and concluded to be as follows:

Description by geodetic positions (North American Datum) of the line that forms the Mississippi-Louisiana state boundary between Latitude 32° 15′ and 32° 09′ and Longitude 90° 58′ to 91° 07′, that is, in the area commonly known as Reed Bedford, Oak Bend, Diamond Island and Diamond Point,

Beginning at a point where the live thalweg of the Mississippi River crosses the line 32° 15′ North Latitude;

Thence Southward along the live thalweg of the Mississippi River to a point where the live thalweg crosses the line that runs South 60° East from the point that is at Lat. 32° 11′ 34″—Long. 90° 59′ 47″.

Thence leaving the thalweg of the Mississippi River and running North 60° West to the point being at Lat. 32° 11′ 34″—Long. 90° 59′ 47″;

Thence running westward along the dead thalweg of the abandoned channel of the Mississippi River (lower Oak Bend) to a point that is at Lat. 32° 11′ 29″—Long. 91° 00′ (S-5 Smith Exhibit 5).

Thence leaving the dead thalweg of the abandoned channel of lower Oak Bend and running Northward (along the Suter line, Smith Exhibit 5) to a point that is at Lat. 32° 11′ 46″—Long. 91° 00′ 09″ (S-4, Smith Exhibit 5);

Thence Northward to a point that is at Lat. 32° 11′ 51″—Long. 91° 00′ 11″ (S-3, Smith Exhibit 5);

Thence Northward to a point that is at Lat. 32° 12′ 44″—Long. 91° 00′ 20″ (S-2, Smith Exhibit 5);

Thence Northward to a point that is at Lat. 32° 13′ 09″—Long. 91° 00′ 14″ (S-1, Smith Exhibit 5);

Thence Northward to a point that is at Lat. 32° 13′ 21″—Long. 91° 00′ 10″ (S_2 Smith Exhibit 5).

Thence running westward along the dead thalweg of the abandoned channel of the Mississippi River that loops around the Northern side of Diamond Island (Diamond Island Towhead) to a point that is at Lat. 32° 13′ 22″—Long. 91° 00′ 13″;

Thence Westward to a point that is at Lat. 32° 13′ 26″—Long. 91° 00′ 22″;

Thence Westward to a point that is at Lat. 32° 13′ 31″—Long. 91° 00′ 30″;

Thence Westward to a point that is at Lat. 32° 13′ 36″—Long. 91° 00′ 37″;

Thence Westward to a point that is at Lat. 32° 13′ 44″—Long. 91° 00′ 47″;

Thence Westward to a point that is at Lat. 32° 13′ 49″—Long. 91° 00′ 53″;

Thence Westward to a point that is at Lat. 32° 13′ 55″—Long. 91° 01′;

Thence Westward to a point that is at Lat. 32° 14'— Long. 91° 01' 05";

Thence Westward to a point that is at Lat. 32° 14' 09"— Long. 91° 01' 15";

Thence Westward to a point that is at Lat. 32° 14' 17"— Long. 91° 01' 29";

Thence Westward to a point that is at Lat. 32° 14' 23"— Long. 91° 01' 43";

Thence Westward to a point that is at Lat. 32° 14' 29"— Long. 91° 02";

Thence Westward to a point that is at Lat. 32° 14' 32"— Long. 91° 02' 16";

Thence Southward to a point that is at Lat. 32° 14' 31"— Long. 91° 02' 33";

Thence Southward to a point that is at Lat. 32° 14' 26"— Long. 91° 02' 48";

Thence Southward to a point that is at Lat. 32° 14' 16"— Long. 91° 03';

Thence Southward to a point that is at Lat. 32° 14' 00"— Long. 91° 03' 06";

Thence Southward to a point that is at Lat. 32° 13' 54"— Long. 91° 03' 08" ("C" Smith Exhibit 5).

Thence running southward (along Smith line "C" Exhibit 5) to the point that is Lat. 32° 13' 41"—Long. 91° 03' 10" (C-1 Smith Exhibit 5);

Thence Southward to the point that is at Lat. 32° 13' 31" —Long. 97° 03' 16" (C-2 Smith Exhibit 5);

Thence Southward to the point that is at Lat. 32° 13' 07" —Long. 91° 03' 40" (C-3 Smith Exhibit 5).

Thence running westwardly along the dead thalweg of the abandoned channel of the Mississippi River (lower Oak Bend) to the point that is at Lat. 32° 13' 23"—Long. 91° 04';

Thence Westwardly to a point, Lat. 32° 13' 37"—Long. 91° 04' 30";

Thence Westwardly to a point, Lat. 32° 13′ 35″—Long. 91° 05′;

Thence Westwardly to a point, Lat. 32° 13′ 26″—Long. 91° 05′ 30″;

Thence Westwardly to a point Lat. 32° 13′ 04″—Long. 91° 06′;

Thence Westwardly to a point, Lat. 32° 12′ 30″—Long. 91° 06′ 28″;

Thence Westwardly to a point at the head of Palmyra Lake and Kellogg Lake (where the Northern and Western boundary of Diamond Point ends and which is point of beginning of the Southern boundary of Diamond Point), Lat. 32° 12′ 24″—Long. 91° 06′ 44″;

Thence Westwardly along the thalweg of Palmyra Lake to a point, Lat. 32° 12′ 26″—Long. 91° 07′.

That portion of the Southern boundary of Diamond Point that also forms the Mississippi-Louisiana state boundary is described as follows:

Beginning at the thalweg of the Mississippi River at the lower end of Diamond Point Cut-off at a point, being at Lat. 32° 09′ 46″—Long. 91° 00′ (Smith Exhibit 5);

Thence Westwardly along the dead thalweg of the abandoned channel of the Mississippi River and so-called Kellogg Lake to a point, Lat. 32° 09′ 43″—Long. 91° 00′ 30″;

Thence Westwardly to a point, Lat. 32° 09′ 40″—Long. 91° 01′;

Thence Westwardly to a point, Lat. 32° 09′ 45″—Long. 91° 01′ 30″;

Thence Westwardly to a point, Lat. 32° 10′—Long. 91° 01′ 52″;

Thence Westwardly to a point, Lat. 32° 10′ 07″—Long. 91° 02′;

Thence Westwardly to a point, Lat. 32° 10′ 27″—Long. 91° 02′ 29″;

Thence Westwardly to a point, Lat. 32° 10′ 41″—Long. 91° 03′;

Thence Westwardly to a point, Lat. 32° 10′ 50″—Long. 91° 03′ 30″.

The following portion of this description is inserted here to complete the Southern boundary of Diamond Point and to join the two portions of the Mississippi-Louisiana state boundary:

Thence continuing Westwardly along the dead thalweg in the abandoned channel of the Mississippi River and so-called Kellogg Lake to a point, Lat. 32° 10′ 54″—Long. 91° 04′;

Thence Westwardly to a point, Lat. 32° 11′—Long. 91° 04′ 18″;

Thence Westwardly to a point, Lat. 32° 11′ 03″—Long. 91° 04′ 30″;

Thence Westwardly to a point, Lat. 32° 11′ 11″—Long. 91° 05′;

Thence Westwardly to a point, Lat. 32° 11′ 25″—Long. 91° 05′ 30″;

Thence Westwardly to a point, Lat. 32° 11′ 44″—Long. 91° 06′;

Thence Westwardly to a point, Lat. 32° 12′—Long. 91° 06′ 10″;

Thence Westwardly to a point, Lat. 32° 12′ 07″—Long. 91° 06′ 15″;

Thence Westwardly to a point, Lat. 32° 12′ 20″—Long. 91° 06′ 30″;

Thence Westwardly to a point, Lat. 32° 12′ 24″—Long. 91° 06′ 44″ (being the point at the head of Palmyra Lake and Kellogg Lake where the Northern and Western

boundary of Diamond Point ends and joins with the Southern boundary of Diamond Point).

VI.

Recommendations for a Decree

I recommend the following decree:

1. That it be decreed that the true boundary between the States of Mississippi and Louisiana at the places involved in this case be determined to be as set forth under Part V of this report.

2. That the costs of this suit be equally divided between the two States.

Respectfully submitted,

D. K. M. KAMY,
Special Master.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

Number 11, Original

STATE OF MISSISSIPPI,
Plaintiff

versus

STATE OF LOUISIANA,
Defendant

Exceptions of the State of Louisiana to the Report of the Special Master Filed March 14, 1955, and Motion for Leave to File Brief and to Present Oral Argument

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STATE OF MISSISSIPPI,

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versus

STATE OF LOUISIANA,

Defendant

Exceptions of the State of Louisiana to the Report of the Special Master Filed March 14, 1955

To the Honorable Supreme Court of the United States of America:

The State of Louisiana, defendant, pursuant to the order of this Court, herewith submits its exceptions to the report of the Special Master, D. K. McKamy, filed in this case on March 14, 1955, in the following particulars, to-wit:

1.

Defendant excepts to the finding of Fact No. 3 as to Diamond Island, and moves to amend the same by changing the last sentence thereof to read, viz:

"This channel continued to be a running stream, other than at some low water stages of the river, as late as 1878-80, the date set forth on Mississippi River Commission Chart, published in 1883 (Exhibit Fisk—Cross-Examination No. 4, R. 328), and which chart (Plate I of the brief) clearly reveals this channel to be a running stream."

2.

Defendant excepts to the finding of Fact No. 4 as to Diamond Island, and moves to amend the same so that it will read, viz:

"The hydrographic survey of the Mississippi River of the published date of 1882, but based on 1878-80 survey (Complainant's Exhibit No. 9, R. 110), is based on the same data of 1878-80 as Mississippi River Commission Chart published in 1883 (Exhibit Fisk Cross-Examination No. 4, R. 328)—Plate I of the brief—which shows the channel around Diamond Island to be a running stream at a low water stage of the river."

3.

Defendant excepts to the finding of Fact No. 5 as to Diamond Island, and moves to amend the same so that it will read, viz:

"The flow of the River was divided when the chute channel was formed and one branch of the channel continued around the island until that channel was abandoned. The other branch of the channel was into the chute cut-off and became the sole channel of the River when the old channel was abandoned. The division of the flow was caused by the island. The boundary in the old channel around Diamond Island should be fixed in the

last channel, which was surveyed on the ground and shown in Louisiana Exhibit No. 36 (R. 1325), and the point shown thereon as the head of the final thalweg of that old channel should be the upstream end of the boundary, the point where the boundary between the states in the old channel commences."

4.

Defendant excepts to the finding of Fact No. 6 as to Diamond Island, and moves to substitute in lieu thereof the following, viz:

"When the old channel around Diamond Island became fixed in the last channel, which was surveyed on the ground and shown in Louisiana Exhibit No. 36 (R. 1325), all of the accretions formed to the right bank, Bedford Bar, upstream from the point shown on said exhibit as the head of the final thalweg of the old channel, are Louisiana accretions inasmuch as the bed and channel in front of this right bank were changed by the natural and gradual processes known as erosion and accretion, and the boundary that was in such bed and channel followed the varying course of the river."

5.

Defendant excepts to the finding of Fact No. 7 as to Diamond Island, and moves to substitute in lieu thereof the following, viz:

"The boundary between the States of Louisiana and Mississippi in the old channel was not changed by the avulsion and was fixed in the last channel, which was surveyed on the ground and shown on Louisiana Exhibit No. 36 (R. 1325) from the point shown on such exhibit as the head of the final thalweg of the old channel around the island to the north and west of the position of the

thalweg in that channel when it ceased to be a running stream sometime after the period 1878-80, as depicted on the Mississippi River Commission Chart published in 1883 (Exhibit Fisk Cross-Examination No. 4, R. 328)—Plate I of the brief.

6.

Defendant excepts to the finding of Fact No. 9 as to Diamond Island, and moves to substitute in lieu thereof the following, viz:

"9(a)

"That all of the accretions south of Diamond Island were formed and attached to that part of the Louisiana shore (Bedford Bar) upstream from the head of the final thalweg in the old channel (the point of division or beginning of boundary between the states fronting on the river); and that such accretions tailed down in front of, without being attached or connected to, the island, and belong to Louisiana.

"9(b)

"(In the alternative, and only in the event 9(a) is not adopted)

"In accordance with the legal principle concerning division of accretions urged by both the State of Mississippi and the State of Louisiana, the boundary between the two states in the Diamond Island-Diamond Island Towhead Area on the east should be fixed by beginning at the head of the final thalweg of the old channel around the island as surveyed on the ground and shown on Louisiana Exhibit No. 86 (R. 1325) and extending across the accretions at right angles to the successive thalweg positions of the river; all as shown on Plate 2 of La. Exhibit No. 43 (R. 1398); and on the west, should be

extended across the accretions beginning at Point C and along the line to Point C_1, Point C_2, and Point C_3, as shown on Smith Exhibit 5 (R. 679). The points and lines, according to the testimony, can be easily located on the available official government charts and upon the ground by survey."

7.

Defendant further excepts to the findings of fact not containing the following finding as to Diamond Island Towhead Area, and moves to amend the same by adding thereto the following finding of fact:

"11.

"That the southern boundary of Diamond Island Towhead is in the old Oak Bend Channel of the Mississippi River where it will remain so long as that channel remains a running stream, subject to be changed by erosion and accretion."

8.

Defendant excepts to the finding of Fact No. 1 as to Diamond Point, and moves to substitute in lieu thereof the following, viz:

"1.

"Based upon the admissions of the State of Louisiana and upon the evidence, Diamond Point is located in the State of Mississippi; that the northerly boundary thereof is in the old Oak Bend Channel of the Mississippi River where it will remain so long as that channel remains a running stream, subject to be changed by erosion and accretion; which old channel separates Diamond Island Towhead Area from Diamond Point Area from the east

at Diamond Cut to the west at Palmyra Lake; that the boundary in Newtown Bend is in the old channel to the north of the island lettered "A" on La. Exhibit No. 29 (R. 1101) where it remained until that channel ceased to be a running stream, which old channel is readily visible and can easily be surveyed on the ground today; that from Palmyra Lake on the west to the west end of the old channel to the north of said island lettered "A" on La. Exhibit No. 29 (R. 1101) when that channel ceased to be a running stream, the correct boundary in that area is as described by the State Boundary portion of the Special Master's Report."

9.

Defendant excepts to the finding of Fact No. 2 as to Diamond Point and moves to amend the same by adding thereto the following clause:

"except that neither the time elapsed nor any possession claimed is sufficient for the doctrine of prescription to apply to the island in Newtown Bend south of Diamond Point which sometime after 1932-3 became attached to Diamond Point, and which island is lettered A on La. Exhibit No. 29", (R. 1101).

10.

Defendant does not except to the conclusion of Law No. 5 as stated, but defendant does except to the Master disregarding such conclusion of law; which is, that where there is a boundary in an old channel around an island formed by an avulsive cut-off, that so long as that old channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion, and substituting therefor a conclusion of law directly in conflict, viz: that when there is a boundary in an old channel around an island formed

by an avulsive cut-off, that when that channel can no longer be used for navigation and/or no water can enter it at some low stages, then the boundary becomes fixed at such time, despite the fact that the channel is a running stream at other than such low stages and is subsequently changed by erosion and accretion.

11.

Defendant does not except to the conclusion of Law No. 3 as stated, but defendant does except to the Master's disregarding such conclusion of law, which is, that where the course of a boundary stream is changed through the operation of the natural and gradual process of erosion and accretion, the boundary follows the stream and remains the varying center of the channel; and substituting therefor a conclusion of law directly in conflict, viz: by use of a new theory developed by Mississippi's expert witnesses of "divided thalweg" or "point of divergence of thalwegs" freezing a boundary in a running stream for a distance of about a mile and a fraction upstream from the head of an island formed by an avulsive cut-off, despite the fact that this portion of the bed and channel of the river changed because there was a running stream therein, through the operation of the natural and gradual process of erosion and accretion.

Respectfully submitted,

FRED S. LEBLANC
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Baton Rouge, Louisiana

JOHN L. MADDEN
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Of Counsel:

EDGAR H. LANCASTER, JR.
Special Assistant Attorney General
State of Louisiana
Tallulah, Louisiana

LANE FULLER
Special Assistant Attorney General
State of Louisiana
Ruston, Louisiana

CERTIFICATE

This is to certify that copies of the foregoing exceptions to the report of the Special Master have been served upon counsel of record of the State of Mississippi by mail, deposited in a United States mail box, with first class postage prepaid, addressed to counsel of record of the State of Mississippi at the post office address listed.

Baton Rouge, Louisiana, May 6, 1955.

JOHN L. MADDEN
Assistant Attorney General
State of Louisiana

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

Number 11, Original

STATE OF MISSISSIPPI,

Plaintiff

versus

STATE OF LOUISIANA,

Defendant

Motion for Leave to File Brief and to Present Oral Argument

Louisiana, by its Attorney General, respectfully moves the Court to grant leave to file a brief in support of its exceptions to the Report of the Special Master, and to have this matter set down for a hearing before the Court, at which time counsel for the State of Louisiana may have the opportunity of presenting oral argument.

FRED S. LEBLANC
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Louisiana
2201 State Capitol
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JOHN L. MADDEN
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Special Assistant Attorney General
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Tallulah, Louisiana

LANE FULLER
Special Assistant Attorney General
State of Louisiana
Ruston, Louisiana

CERTIFICATE

This is to certify that copies of the foregoing motion for leave to file brief and to present oral argument have been served upon counsel of record of the State of Mississippi by mail, deposited in a United States mail box, with first class postage prepaid, addressed to counsel of record of the State of Mississippi at the post office address listed.

Baton Rouge, Louisiana, May 6, 1955.

JOHN L. MADDEN
Assistant Attorney General
State of Louisiana

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Supreme Court of the United States

OCTOBER TERM, 1954.

No. 11 Original

THE STATE OF MISSISSIPPI,

Complainant,

versus

THE STATE OF LOUISIANA,

Defendant.

PETITION FOR RE-HEARING.

L. BRYAN DABNEY,
Of the law firm of
DABNEY & DABNEY, of
Vicksburg, Mississippi,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 11, ORIGINAL.

THE STATE OF MISSISSIPPI,

Complainant,

versus

THE STATE OF LOUISIANA,

Defendant.

PETITION FOR RE-HEARING.

To the Honorable Earl Warren, Chief Justice of the Supreme Court of the United States of America, and Associate Justices:

The Petition for Re-hearing filed herein by Eleanor R. Woolgar and Irma L. Richards, residents and citizens of the state of Indiana, and the original Movants in Intervention, would respectfully show to this Court, as follows:

Petitioners show that on the 14th day of October, 1954, this Court entered an order denying Petitioners' (then

Movants') Motion to intervene as co-defendants in that certain cause captioned "*Mississippi versus Louisiana*, #11 Original" on the docket of this Court, and they now with great deference show that said Order should not have been entered in said cause; and that they are entitled to a re-hearing herein, as well as a hearing and argument of their counsel on this instant petition, and for the following reasons:

Petitioners show that were this a bona-fide contest between these two states the Court's ruling would be unassailable and these Petitioners and their counsel would be the last to question the Order, but such is not the case, as has been shown conclusively before and now is again re-iterated.

This Court has on numerous occasions, and in no uncertain terms, declared that where it is shown that the action is not one brought in good faith between two states, or brought for the benefit of private individuals, it will not entertain the proceedings; that this Court will look behind the scenes and ascertain the motif inspiring the litigation to ascertain if it is in reality a genuine and bona-fide issue between the states. *This is precisely what we have been, and are now, asking this Court to do.*

Petitioners re-iterate that the instant suit had no right to be brought within the original jurisdiction of the United States Supreme Court pursuant to Article III, Section II, 2 of the Constitution of the United States. See authorities cited in Petitioners' Answer in Intervention and Answer to Motion to Dismiss.

This proceeding has a rather complicated and involved back-ground, and while at first glance it might have the appearance of an action between two states, in which no private or vested interests were involved or entrenched, such is not the case and it is for this reason that we are urging upon this Court the imperative necessity of checking carefully its back-ground; or at least giving these Petitioners an opportunity of being heard and by doing so, bring to the attention of this Court the motivating power behind this most unusual proceeding. Nothing more or less is what they ask of this Court.

Petitioners also further request of this Court that this Petition for a Re-hearing be gone into fully and that they be allowed to present for the inspection of this Court the transcript or record of the proceedings now pending in the U. S. District Court at Monroe, Louisiana, in those certain causes captioned: "*Eleanor R. Woolgar and Irma L. Richards v. C. W. Hunter Company*," being Number 1940 on the Docket of the United States District Court, Western District of Louisiana, and which case has been consolidated with the cases of "*Albert W. Iselin, et al. v. C. W. Hunter Company, et al.*," Number 1939 and "*John F. Iselin v. J. H. Valentine*," Number 3066 in the same court.

Petitioners attach hereto the following Exhibits, and ask that they be made and taken as a part of this Petition as much so as if copied in full herein.

Exhibit "A" Field Notes of Township 14, North Range 14 East, District North of Red River for year 1828 by Currie & McPhaille.

Exhibit "B" Township Plat for the years 1828-1830

Exhibit "C" Map prepared by A. W. Iselin showing locations of Sections and river changes.

Exhibit "D" Map of Killakranka and Davis cut-offs.

Exhibit "E" Township plat one-third larger than regular township plat.

Exhibit "F" Reconnaissance map of Mississippi River of 1874 showing scale of one inch to a mile.

Exhibit "G" Map showing 1904 cut-off.

Exhibit "H" Mississippi River Commission map of 1883.

Exhibit "I" Mississippi River Commission Chart No. 50.

Exhibit "J" Railroad Commission map of Louisiana.

Exhibit "K" Mississippi River Commission map of 1913.

Exhibit "L" Plat by L. W. Vallaine, November, 1923.

Exhibit "M" Mississippi River Commission map of 1939.

All of the aforementioned plats will conclusively show that there is absolutely no need for a decision of this Court fixing the boundary line between Mississippi and Louisiana along the course in question; that the said boundary separating these states is well-defined and easily discernible.

What the states of Mississippi and Louisiana are angling for, the former aided and abetted by the Learned and Hunter interests, is to have the boundary line drawn so as to show it as shifted from the 1904 deserted river-bed wherein the state boundary actually belongs today, and placing it in the 1908-1913 course. We urge and press upon this Honorable Court the stern necessity of stopping them in this unholy design.

In conclusion, Petitioners request that this Honorable Court reconsider their action in entering the said order denying their right of intervention, re-open the matter and permit them to be heard; and at least permit and allow their counsel to appear as *amicus curiae*.

Respectfully submitted,

ELEANOR R. WOOLGAR AND
IRMA L. RICHARDS,
By L. BRYAN DABNEY, of the law
firm of DABNEY & DABNEY,
of Vicksburg, Mississippi,
Counsel.

CERTIFICATE.

I, L. Bryan Dabney, of counsel for the Petitioners, Mesdames Eleanor R. Woolgar and Irma L. Richards, do hereby certify that the said Petition for a Re-hearing is presented in good faith and not for delay,

This 8th day of November, 1954.

L. BRYAN DABNEY,
Of the law firm of
DABNEY & DABNEY, of
Vicksburg, Mississippi,
Counsel for Eleanor R. Woolgar and Irma L. Richards.

CERTIFICATE.

This is to certify that copies of the foregoing Petition for Rehearing have been served on the Attorney General of the State of Mississippi, and the Attorney General of the State of Louisiana.

Vicksburg, Mississippi, this 8th day of November, 1954.

L. BRYAN DABNEY,
Of the law firm of
DABNEY & DABNEY, of
Vicksburg, Mississippi,
Counsel for Eleanor R. Woolgar and Irma L. Richards.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

Number 11, Original

STATE OF MISSISSIPPI,
Plaintiff

versus

STATE OF LOUISIANA,
Defendant

Original Brief on Exceptions to the Special Master's Report in Behalf of the State of Louisiana

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Franklin Press, Inc. — *Baton Rouge, La.*

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IN THE

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STATE OF MISSISSIPPI,

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STATE OF LOUISIANA,

Defendant

Original Brief on Exceptions to the Special Master's Report in Behalf of the State of Louisiana

---

To the Honorable Supreme Court of the United States of America:

JURISDICTION

This is an original action brought by the State of Mississippi against the State of Louisiana to establish the boundary between them in two separate and distinct areas. Jurisdiction is confirmed by Article 3 Section 2 of the Constitution and by Section 1251, Title 28 U. S. C. A.

STATEMENT OF THE CASE

The case has been heard by the Special Master appointed (346 U.S. 862, 98 L.Ed. 60, 74 S.Ct. 102) by this Court, his report filed, and this brief is in support of the exceptions filed by the State of Louisiana to the said report.

Inasmuch as there are two definite and separate areas involved, they will be treated separately, just as the Special Master has done. The two areas were spoken of by the Master as the (1) Diamond Island Towhead Area and the (2) Diamond Point Area.

PART A.

DIAMOND ISLAND TOWHEAD AREA

Questions Presented for Review

1. (a) In what varying location of the old channel is the boundary to be fixed in such old channel around Diamond Island, inasmuch as it is not disputed that the island was formed as a result of an avulsive cut-off? This Court having held (*Arkansas v. Tennessee*, 246 U.S. 158, 38 S.Ct. 301, 62 L.Ed. 638) that "So long as the old channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion," whilst the Special Master, though he quoted such law as fixed by this Court, nevertheless, ignored the same, and held "that where the old channel . . . can no longer be **used for navigation**" and (apparently and/or) "no water can enter the channel **at low stages** of the river" the boundary becomes fixed in the old channel (Report 10).

(b) The same legal question is also applicable to the old channel at Oak Bend of the Mississippi River, the southerly boundary of Diamond Island Towhead Area.

2. In the event the boundary is fixed in the case of an avulsion, in the old channel when "it can no longer be used for navigation" and/or when "no water can enter the chan-

nel at low stages," then where is the boundary to be fixed in the Mississippi River upstream from Diamond Island, when the island was formed by an avulsion? Though this Court has said "It is settled beyond the possibility of dispute that where running streams are the boundaries between states, . . . , that when the bed and channel are changed by the natural and gradual processes known as erosion and accretion, the boundary follows the varying course of the stream; . . ." (*Arkansas v. Tennessee*, supra, 246 U.S. 158, 38 S.Ct. 301, 62 L.Ed. 638), nevertheless, the Special Master by use of a new theory developed by expert witnesses testifying in behalf of the State of Mississippi of "divided thalweg" or "point of divergence of thalwegs," repudiates what this Court so said was "settled beyond the possibility of dispute" and freezes the boundary and makes it fixed and not subject to change in the river for a distance of about a mile and a fraction upstream from the head of Diamond Island to a "Point S, as shown on Exhibit 5 to Smith's testimony" (Report 41) despite the fact that this portion of the bed and channel of the Mississippi River (for the distance of this mile and a fraction upstream from Diamond Island) was subsequently changed by the natural and gradual processes known as erosion and accretion.

3. To which state do accretions belong when they tailed down in front of Diamond Island, admittedly Mississippi territory, without being formed to such State, but being formed to, and an extension of, Bedford Bar, admittedly Louisiana territory?

4. In the event the accretions formed in front of Diamond Island are considered Mississippi territory, the question is then whether the point of beginning, or boundary on the

river, for the division of the accretions should be the head of the final thalweg of the old channel as shown on Louisiana Exhibit No. 36 (R. 1325) or the "Point S" as held by the Master; this question being controlled by the answer to questions one and two above.

Statement of the Case Applicable to Diamond Island Towhead Area

The history of this area, claimed by Mississippi, and admitted by Louisiana, is that a point bar built out from the State of Mississippi (left bank) called Diamond Point, and a tip of such bar was cut off by an avulsion, forming what is known as Diamond Island about 1864-1866 (Report 16). Subsequently, Diamond Point, by the processes of erosion and accretion in the Mississippi River, moved in a westerly-southwesterly direction and left behind on its right bank a remnant of this Diamond Island. This Diamond Island, in accordance with the well settled jurisprudence of this Court, having been formed by an avulsive cut-off, remained a part of the State of Mississippi, though it is now on the right bank or Louisiana side of the river.

The main question to be adjudicated is the boundary of such Diamond Island; the boundary to the north and west of the island not being disputed. The next question is to determine which state owns the vast mass of accretions (approximately 7,500 acres) formed to the right bank of the river, in the vicinity of and to the east and south of this island, and to do so it is first requisite that the boundary of the island to the east (upstream boundary) be located. The legal conclusions of the Special Master as to the location of the boundary to the east or upstream from the island are excepted

to by the State of Louisiana as being contrary to the jurisprudence of this Court, settled in *Arkansas v. Tennessee*, supra, 246 U.S. 158, 38 S.Ct. 301, 62 L.Ed. 638.

In the event the east or upstream boundary of the island was located approximately a mile and a fraction upstream from the island in the channel, when the old channel closed, then the Court must determine what happened to the boundary in the vicinity of this mile and a fraction upstream. This legal question is also purely a legal one and is controlled by the jurisprudence of this Court recognized as being "settled beyond the possibility of dispute" in *Arkansas v. Tennessee*, supra.

The Court is to also determine to whom the accretions in front of the island belong; and alternatively, the point of beginning on the river for a division of such accretions.

The remaining question is the southern boundary of such accretions, which is in another old channel of the river (Oak Bend) left after the artificial avulsive cut-off in 1933, through the neck as it then existed of Diamond Point. The same legal question is again presented as to when the boundary in this channel is to become fixed.

Comments on Size of Record with Reference to Diamond Island Towhead Area

Though the record in this case appears mountainous, we believe that it will only be necessary for this Court to consider a very small portion thereof, in connection with the Diamond Island Towhead Area, for the following need not be considered on this phase, viz:

(a) The large portion of the exhibits (approximately half), and a large part of the evidence in the record,

brief, can only be defended on the theory that it was the head of the channel around the island **when navigation therein at some low water stages ceased**, and that such theory does violence to the holding of this Court in *Arkansas v. Tennessee*, supra, that

> "So long as that channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; . . . ."

There is a sound and logical reason why the holding of this Court in *Arkansas v. Tennessee*, supra, was adopted and should be adhered to. Such an important boundary as one between states should not be left to the conjecture indulged in by the Special Master in arriving at his "Point S," which is premised on the time when navigation at the lowest of low water stages around the island ceased. Whereas, in accordance with the ruling of this Court in such cited case, the boundary follows the stream (so long as the stream remains a running one), and is subject to be changed by erosion and accretion, and there is no need for conjecture as to its location, for as it migrates due to erosion and accretion, its location at all times can be seen. There is then no need for geological experts to find such a boundary, for even after the stream has ceased to be a running one, its old bed can readily be found and surveyed, just as the State of Louisiana did in this case, as represented by its survey on the ground today of the old abandoned channel (Louisiana Exhibit No. 36, R. 1325). If this Court were to change the law as heretofore settled by it to that adopted by the Special Master, then in every case of an avulsion on the Mississippi River, it would take a lawsuit, ending largely in conjecture, to locate the boundary. Whereas,

all of which have to do with the Diamond Point Area.

(b) Another very large portion of the remaining exhibits, which have to do with the admitted fact, that Diamond Island was originally formed by an avulsive cut-off.

(c) Another very large portion of the remaining exhibits and testimony which have to do with possession.

In the main, this portion of the case will turn on legal questions, for the almost conclusive facts, in connection with these legal questions, are shown on one particular survey by the Mississippi River Commission, the data for which was obtained in 1878-80 and used by the Commission for two separate charts showing two stages of the water. This survey is extremely important, even if not conclusive as to the facts, in reaching a decision of this case, and was so recognized by the two states; so much so, that it was offered many times by each state and given numerous exhibit numbers, among others, viz:

(a) Complainant's Exhibit No. 9 (R. 110)

(b) Complainant's Exhibit No. 10 (R. 110)

(c) Complainant's Exhibit No. 11 (R. 110)

(d) Fisk No. 5 (R. 79)

(e) Fisk No. 6 (R. 143)

(f) Fisk No. 12 (R. 314)

(g) Smith No. 2 (R. 665)

(h) Smith No. 15 (R. 1457)

(i) La. Cross-Exam. Fisk No. 4, 4A and 4B (R. 328-9)

if this Court merely affirms its already established jurisprudence, then a surveying party can go out in the field and locate the old abandoned channel, as was done here, which will be the boundary.

II.

EVEN THOUGH BOUNDARY WAS FIXED A MILE AND A FRACTION UPSTREAM FROM ISLAND, SUCH BOUNDARY FOLLOWED THE VARYING COURSE OF THE STREAM CHANGED BY EROSION AND ACCRETION.

There is yet another well settled legal proposition which the Special Master's legal conclusion seems counter to. The Master again cited this law but ignored it. That is, as stated in *Arkansas v. Tennessee*, supra.

> "It is settled beyond the possibility of dispute that where running streams are the boundaries between states, . . . , that when the bed and channel are changed by the natural and gradual processes known as erosion and accretion, the boundary follows the varying course of the stream; . . . ."

To see how this holding of the Master runs into the very teeth of the above quoted law, which "is settled beyond the possibility of dispute," we again refer the Court to Plate I of this brief, which shows the Master's "Point S" about a mile and a fraction upstream from the head of the island. The right bank of the Mississippi River (Louisiana territory) had accretions formed to it for this mile and a fraction upstream from the island, which accretions followed the river as its bed and channel were successively changed by the

(j) La. Cross.-Exam. Smith No. 1 (R. 840)

(k) La. Exhibit No. 2, Plate 7 (R. 891)

(l) La. Exhibit No. 16 (R. 1002)

Argument Applicable to Diamond Island Towhead Area

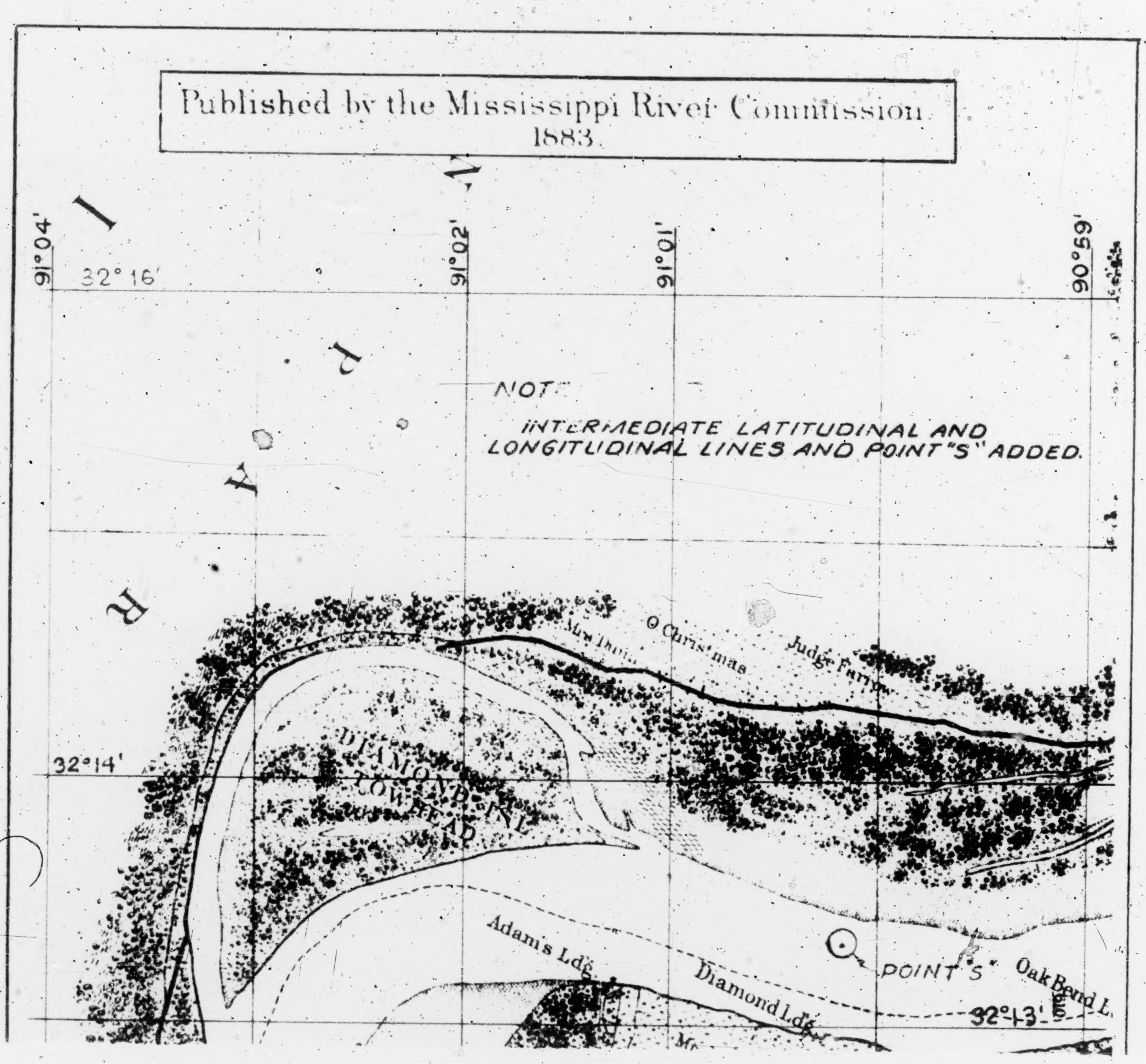
I.

LOCATION OF BOUNDARY WHEN WATER CEASED TO FLOW IN ABANDONED CHANNEL

The argument in behalf of the State of Louisiana is that the jurisprudence of this Court on the main legal issue in this case was settled long ago in the case of *Arkansas v. Tennessee*, 246 U.S. 158, 38 S.Ct. 301, 62 L.Ed. 638, which held that where a stream is a boundary between states, and the stream leaves its former bed and establishes a new one by an avulsion, the boundary remains in the old channel and

> "So long as that channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; . . ."

To graphically demonstrate Louisiana's position, we have taken an excerpt from one of the charts of the all important survey above mentioned, and we will refer to it simply as La. Cross-Exam. Fisk No. 4 (R. 328) (though given numerous other exhibit numbers), as that was when its vital importance was first developed in the record. This excerpt is shown on the opposite page as Plate I. (Plate I-A is the full chart.) By reference to the notes on Exhibits 4, 4-A, and 4-B (R. 3289) and comparison thereof to the notes on Chart 49, which we will refer to as Complainant's Exhibit No. 9 (R.


Published by the Mississippi River Commission
1883.
NOTE
INTERMEDIATE LATITUDINAL AND LONGITUDINAL LINES AND POINT "S" ADDED.
91°04'
91°02'
91°01'
90°59'
32° 16'
32°14'
32°13'
O Christmas
Judge Farris
DIAMOND ISL.
TOWHEAD
Adam's Ldg.
Diamond Ldg.
POINT "S"
Oak Bend L.

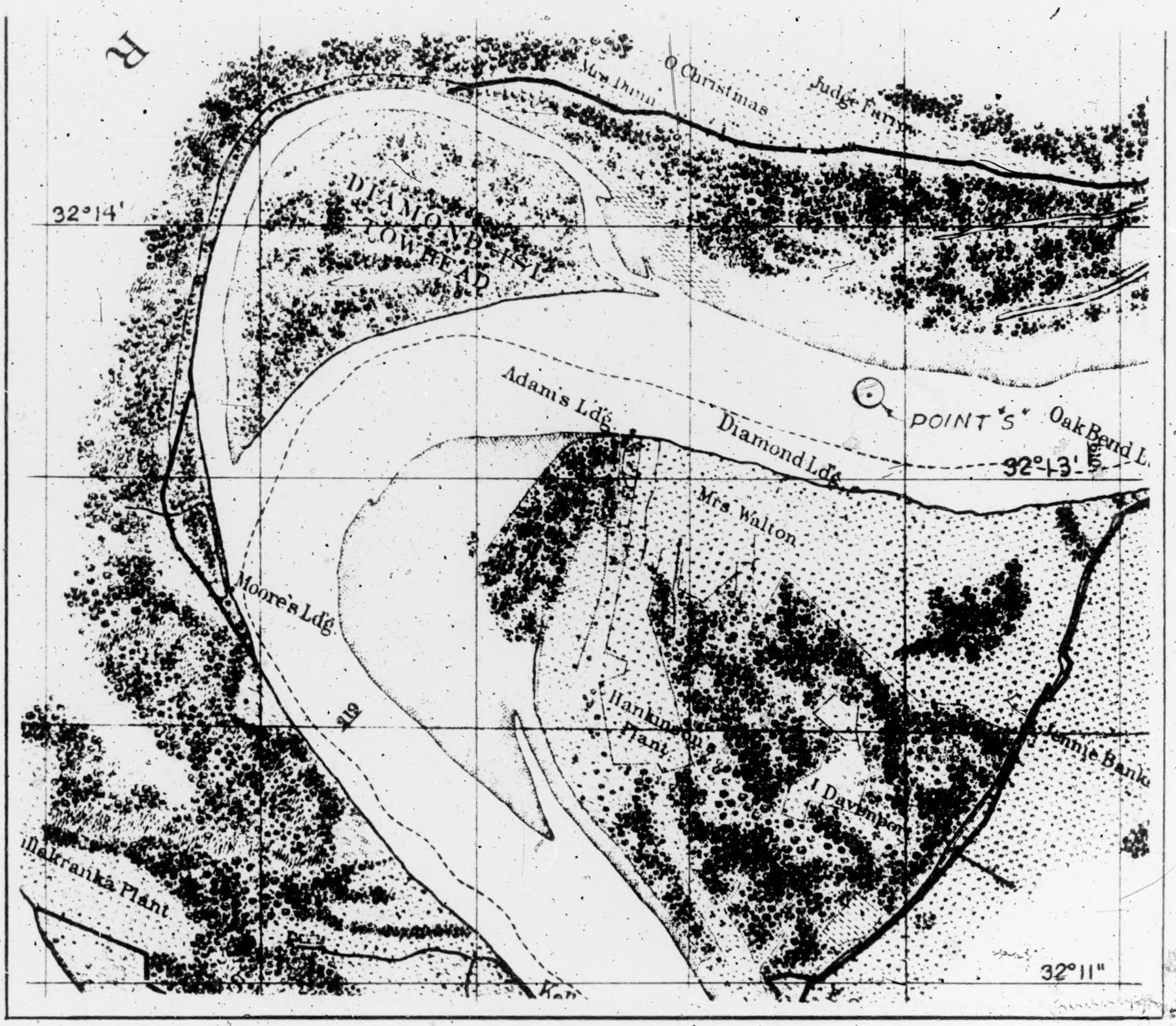
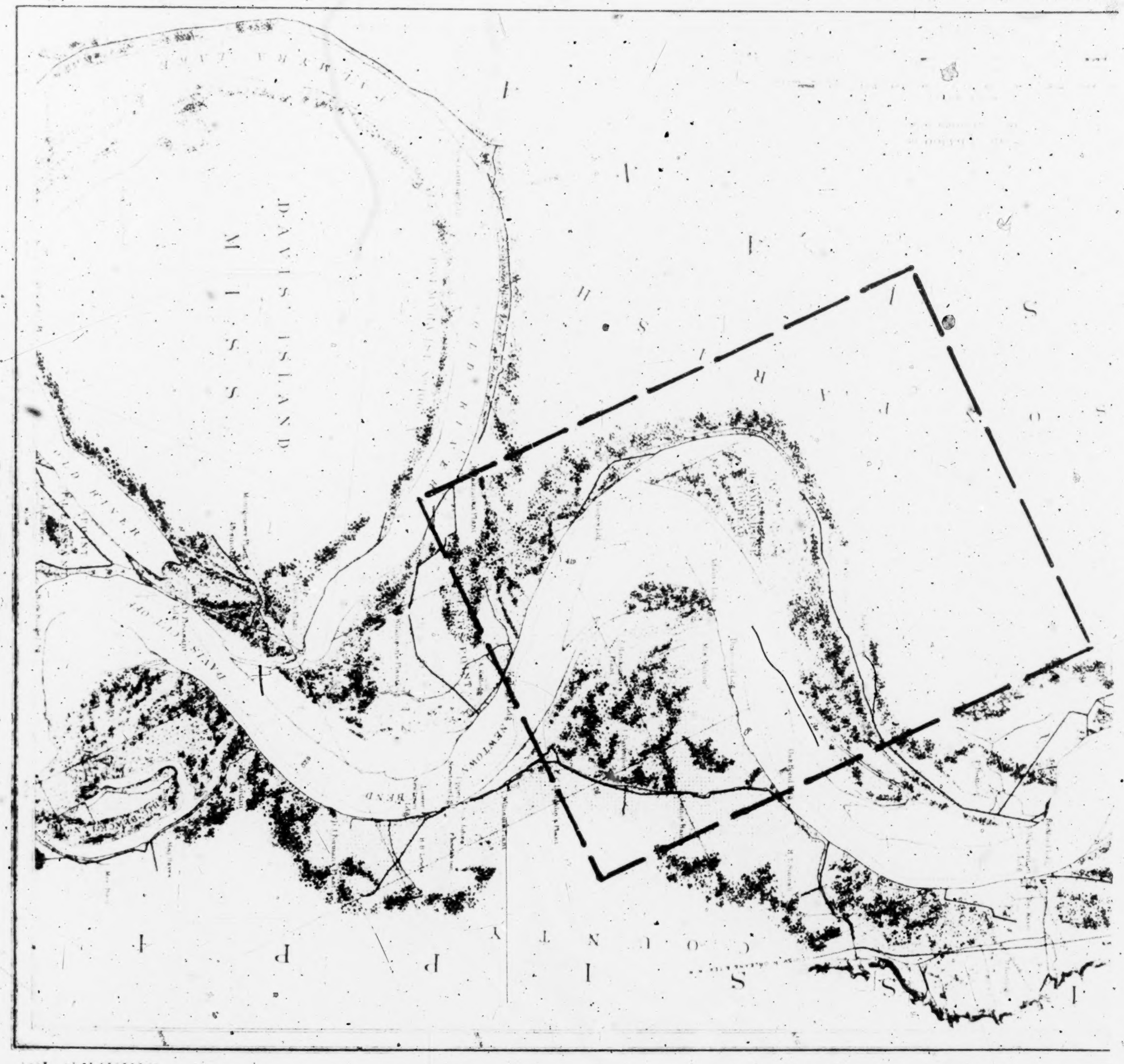


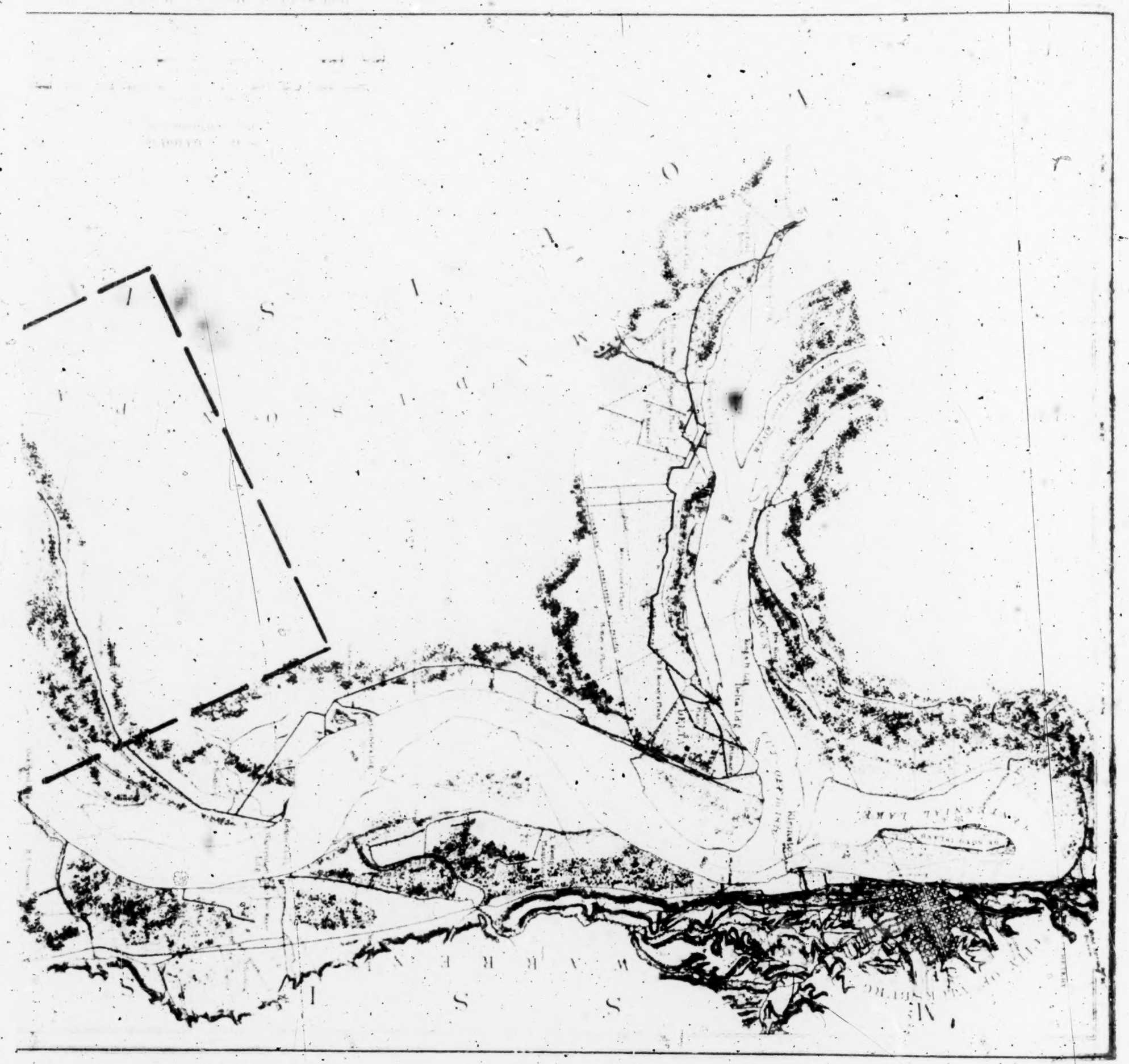
PLATE NO.1

EXCERPT FROM PLATE NO. 1A
(EXHIBIT LA. CROSS EXAM. FISK NO.4 - R 328-9)

PLATE NO. IA
(EXHIBIT LA. CROSS EXAM. FISK NO 4-R. 323-9)



SHEET NO 18



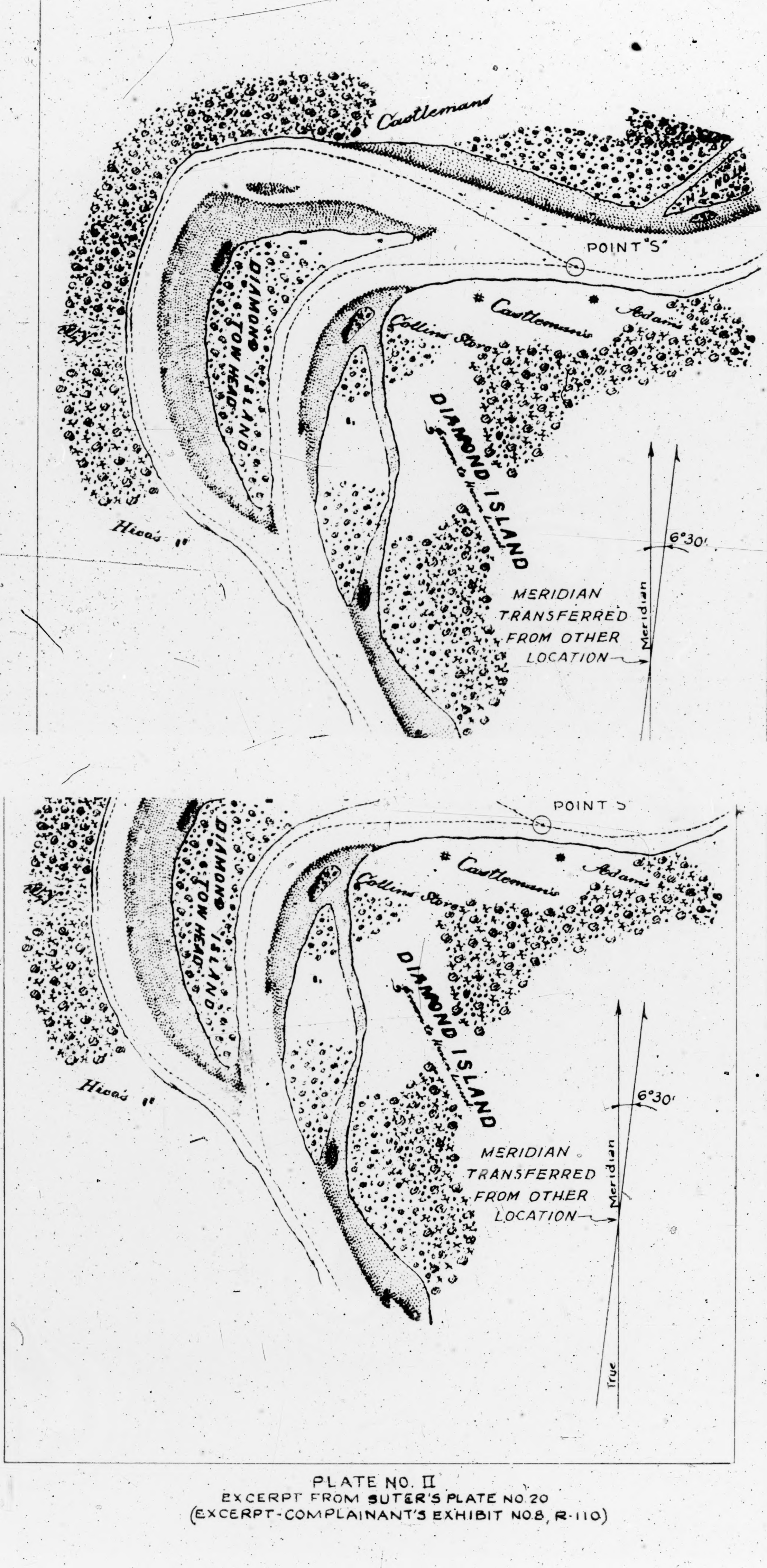


PLATE NO. II
EXCERPT FROM SUTER'S PLATE NO 20
(EXCERPT-COMPLAINANT'S EXHIBIT NO.8, R-110)

erosion to the left bank and the accretions to the right bank (Bedford Bar) in this portion of the channel upstream from the island, as the river migrated to the west. How these accretion bars were formed to Bedford Bar—all being attached to Louisiana shore upstream from the last channel around the island—is graphically pictured by the plates in La. Exhibit Number 2 (R. 891). The geologic report, State of Louisiana Exhibit Number 1 (R. 891), commencing at page 12 thereof, details how these accretion bars were formed. The testimony of the geologists, especially Durham (R. 1033 et seq.) also tells the history of the formation of these accretion bars.

Therefore, when the right bank of the Mississippi River, by accretions thereto, caused that portion of the channel from the head of Diamond Island (or the head of the old channel) upstream to "Point S" to migrate in a westerly direction by accretions on one side of the river and erosion on the other, the boundary that was in this channel (which is the channel upstream from the island), under this law, followed the new successive positions of the bed and the channel as they were changed. Of course, the migration by erosion and accretion of the mile and a fraction of the channel upstream from the island would and could not affect the boundary in the old channel around the island.

The Master further devoted so much of his report to the qualifications of the experts, as well as to their opinions on the method of closing of channels after an avulsion, that we feel called upon to comment thereon. We do this as a secondary proposition, for primarily we submit that the very basis for the Master's opinion is an erroneous legal belief and in

110) (though given numerous other exhibit numbers), it will be seen that the same survey of 1878-1880 by the Mississippi River Commission was used as the basis for both charts. By comparison of the notes on this Chart 49 with the notes on La. Cross-Exam. Fisk No. 4, 4-A and 4-B, it is found that the plane of water used in Chart 49 is a few feet lower than the plane of water (both, however, being low water stages) used in the excerpt of the chart here shown as Plate I.

In the excerpt of the chart shown (Plate I), Diamond Island Towhead can readily be seen as an island **with water flowing in both channels around the island**, with a minimum width of 300 feet (R. 324). And a 300 foot wide river is still quite some river. Whilst in Chart 49, the channel to the north of the island, at its entrance, is shown as closed. The difference in these charts is because of the few feet difference in the plane of water shown on the two charts—both planes, however, being low water stages of the river.

The Special Master held, viz:

> "I believe that when the old channel . . . can no longer be **used for navigation** except in times of flood it no longer has a thalweg. When . . . no water can enter the channel **at low stages** of the river, . . . there is then no current in the old channel and the water has become stagnant." (Report 10) (Emphasis supplied)

Thus, the Master adopts a different legal test as to when the boundary in an old channel, because of an avulsion, "is still subject to be changed" or becomes fixed. He says when it can no longer "be used for navigation" "at low stages" of water, the boundary becomes forever fixed and not subject to change. This holding conflicts with the holding of this

conflict with the jurisprudence of the Court as fixed in *Arkansas v. Tennessee*, supra.

Louisiana witnesses located the "old channel" of the Mississippi River around Diamond Island by its present day survey (La. Exhibit No. 36—R. 1325). This last channel is still present on the ground. The main witness (Fisk) for the State of Mississippi so also located this last channel, see particularly his Plates 8 and 10 of Fisk 4 (R. 46), in connection with his report (Fisk 4), wherein he locates this same last channel. The difference between the opinion of Fisk and Louisiana's contentions are, therefore, only legal; that is, shall the last low water flow for navigation be the test when the boundary in the stream becomes fixed, **or** shall it be when that channel is no longer a running stream and no longer subject to change by erosion and accretion as fixed in *Arkansas v. Tennessee*? Therefore, the fact that Fisk also said that there was another channel where the stream flowed when there was a **50% flow around the island**, or another channel when **no low water flow** was around the island, is of no moment, if the **legal test** is that

> "So long as that channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; . . . ."

And further, if the last channel wherein the stream last flowed, as found by Fisk, is the same last channel that Louisiana contends for, as present on the ground and as so mapped, the "method of closing channels" advocated by Fisk is of no real moment here, even though some of his testimony conflicted with his report.

With reference to the method of closing channels advanced by the witness Smith, we submit that he was so

Court in *Arkansas v. Tennessee*, supra, (which the Master cited but disregarded) wherein this Court said,

> "So long as that channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; . . . ."

To demonstrate forcefully the two conflicting legal positions, that is, the one by this Court and the one by the Special Master, we have superimposed the approximate position of "Point S," as fixed by the Special Master, on Plate I of this brief (Report 41). This "Point S" is approximately one and a fraction miles upstream from the head of Diamond Island Towhead and the head of the old channel as shown on this plate.

In accordance with the survey made in 1878-80, depicted on Plate I of this brief, the current was even at that time yet flowing in the old channel at a stage of low water that was only a few feet higher than the lowest low water. Of course, this stage of water was "about one-third of the extreme oscillation above low water; . . . ." See Exhibit Fisk Cross-Exam. No. 4-B, note (R. 329); or say, about nine feet above the water plane shown on Chart 49. **This is a stage of low water, and not a "flood stage" as intimated by the Master.**

Thus, the issue is square—is it when an old channel can no longer be used **for navigation at low water** that the boundary marked by it then becomes fixed; or is it "So long as that channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; . . . ."?

The evidence was not contradicted that the processes of erosion and accretion do not take place, in the main, at low stages of the river, but occur at high water stages.

The evidence shows that this old abandoned channel around this island, as it exists on the ground today (Louisiana Exhibit No. 36; R. 1325), is almost identical in its location with the small channel of the Mississippi River depicted on Plate I of this brief. This can only lead to the conclusion that the current ceased to flow around the island, and the processes of erosion and accretion in this old channel came to an end, shortly after the survey of 1878-80 by the Mississippi River Commission, which is depicted on Plate I of this brief. Of course, the southern part of the island, more than half thereof as shown by later maps, and as held by the Master, was eroded off, as the main channel migrated to the west.

To further demonstrate the erroneous legal theory adopted by the Special Master, we refer the Court to Plate II of this brief, which is an excerpt from Complainant's Exhibit No. 8 (R. 110), and which is referred to as Major Suter's Map of 1874. We have superimposed on this map the all important "Point S" as fixed by the Special Master. This point is the upstream end of the frozen boundary fixed by the Master. This survey was made approximately five years prior to the survey shown on Plate I of this brief. Again, we note that the greatest portion of this island shown on this survey, the southern portion thereof, that is, was eroded off when the river migrated to the west. And we also note the great distance this "Point S" is upstream from the island—as well as the enormous flow of water in both channels around the island.

thoroughly discounted on that subject, as to make his opinion on that point of no value. His theory was that the abandoned channel was filled by "its plugging on the bottom and gradually comes on up within that channel segment" (R. 1481). Smith said that Exhibit Smith No. 14 (R. 1440) prepared by him, **"reflected a normal pattern of the closing of a channel"** (R. 1480), and was how the Oak Bend Channel closed (R. 1481). Smith Exhibit No. 7 was his idea of a "reconstructed" channel (R. 1484), setting forth how **he thought** the channel around Diamond Island closed (R. 1482), and that,

> "Q And in your opinion, in neither case did the channel that you have depicted on your 'Exhibits No. 7 and 14' migrate in its closing?
>
> "A In my opinion, neither channel migrated with respect to the dead thalweg of any degree." (R. 1483)

In other words, Smith said that a channel just filled layer on top of layer (R. 1481) and that such channel did not migrate in the process of being abandoned. Smith said he used Range 95 in plotting Smith No. 7 (R. 1484). It is noted by reference to Smith Exhibit No. 4 that Range 95 on Oak Bend is some four miles downstream from the entrance to, or the head of, the old channel of Oak Bend. It being recognized by all that the entrance to or the head of an old channel is where the closing of such channel first takes place, why then did Mr. Smith select a point four miles down the channel from the entrance or head? To demonstrate why he so selected Range 95, and the absolute flat contradiction of his opinion, he was requested to plot Range 76 of Oak Bend, using the same surveys of 1932, 1937 and 1949 that he had used on Smith Exhibit No. 14. Remember his theory of

The Special Master used this chart of Major Suter, together with the report of Major Suter (R. 662) accompanying the chart, as the very foundation for his fixing "Point S," which he said was the head of the thalweg in the old channel when it was closed to navigation at low water. But observe the flow in the old channel which the Master says was "abandoned." The Master says,

> "The point which Major Suter showed on his Map No. 20 as the point where the thalwegs divided has been placed by Mr. Smith on Exhibit 5 to his testimony marked by the letter S." (Report 40)

Major Suter's report (R. 662) accompanying the Chart (Plate II) on which the Special Master bottomed his opinion said,

> ". . . the bend of Diamond Island sixteen miles below Vicksburg, filled up, and the channel established itself permanently in the chute." (Report 40)

The Master aptly observed when such argument was orally made by the State of Mississippi that Major Suter was interested only in navigation, and that when his report said the channel filled up, that he obviously meant that the channel filled up for all navigation purposes, such as steamboats of that day.

It is obvious from Plate II of this brief that the river channel was still running (1874) in both channels around the island, and it is also obvious from Plate I of this brief that the river was still running in both channels at some low water stages around the island in 1878-80, some five years later. The Master's "Point S" as located on Plate I of this

channel closing was that the channel did not migrate, but was filled layer on top of layer (R. 1481). Smith's plot of Range 76 (La. Exhibit No. 46—R. 1485) did not show a filling of the channel layer on layer and contrary to his previous opinion, showed that the bed and channel migrated, and that the left bank of the river at Range 76 **migrated approximately 1700 feet** (R. 1486). To cap it all, Mr. Smith then retreated and testified, viz:

> "Q You would say then Oak Bend is not a normal closing of a channel?
>
> "A I would say that segment of Oak Bend is not." (R. 1480)

This, despite his previous testimony, viz:

> "Q And your opinion then is also that 'Smith Exhibit No. 14' demonstrated your opinion as to how Oak Bend channel closed?
>
> "A I beg your pardon, sir, but that's not my opinion,—that's the facts." (R. 1481)

But suppose that the boundary in the old channel did become fixed when there was no low water flow therein, wouldn't the old channel become a running stream when the waters rose and returned to their former bed, and wouldn't the boundary marked by such running stream "still be subject to be changed by erosion and accretion"? That is what this Court said in effect in the case of *State of Nebraska v. State of Iowa*, 143 U.S. 359, 12 S.Ct. 396, 36 L.Ed. 186, viz:

> "By this selection of a new channel the boundary was not changed, and it remained, as it was prior to the avul-

sion, the center line of the old channel; and that **unless the waters of the river returned to their former bed**, became a fixed and unvarying boundary, no matter what might be the changes of the river in its new channel." (Emphasis supplied)

Thus, such case says that even if the water left a channel and the boundary in it became fixed, nevertheless, if "the waters of the river returned to their former bed," then so long as it was a running stream as the waters returned, the boundary marked by it would still be subject to be changed by erosion and accretion.

III.

DIVISION OF ACCRETIONS—DIAMOND ISLAND TOWHEAD AREA

Under either of the above discussed legal principles fixed by this Court, the question next to be decided is the disposition of the accretions formed to the right bank in the vicinity of Diamond Island. The Special Master, based on his "Point S," which is the point where the thalwegs were divided when **navigation "at low water"** around the island ceased, held that the accretions to the Bedford Bar (admittedly Louisiana) for the distance of a mile and a fraction upstream from the head of the island, were Mississippi lands, and fixed the remaining accretions to Bedford Bar, upstream from his "Point S," as Louisiana lands. He divided these accretions by extending "Point S" at right angles to the thalweg of some later charted positions of the river. This "Point S" as well as the said division line fixed by the Master are shown on Smith Exhibit No. 5 (R. 679). This same line was also superimposed at the request of the Master on Plate Number 2 of Louisiana Exhibit Number 43 (R. 1398).

Louisiana contends that the head of the final thalweg of the old channel around Diamond Island is correctly shown on the survey, Louisiana Exhibit Number 36 (R. 1325), which survey is also shown as Plate 10 of Louisiana Exhibit Number 2 (R. 891). Louisiana submits that at the time this old channel, which is still visible on the ground today, ceased to be a running stream the boundary marked by it became there fixed because the processes of erosion and accretion were then at an end and the channel could no longer change. This point is approximately a mile and a fraction down stream from the "Point S" fixed by the Master. And this head of this surveyed old channel is the point where this surveyed old channel boundary commences. This old surveyed channel divided Mississippi from Louisiana, and it was not changed by erosion and accretion thereafterwards because it was not thereafterwards a running stream, as erosion and accretion can only take place in a running stream.

The Special Master placed great weight in locating his "Point S" on the testimony of an elderly former steamboat captain, who had known the area since "the early 1890's" (Report 35), to the effect that there was gravel on the Bedford Bar which was east (up river), in front of, and attached to, the head of Diamond Island where Bedford Bar formed over it. We fail to see the significance of this in view of other evidence in the record. Smith, witness for Mississippi, at one time said the significance of deposits of gravel showed scouring caused by the head of an island, viz:

> "A It would be deposited, I would think, during high stages **and at the point of divergence.**" (R. 1453)

"point of divergence" referring to "Point S." But note Smith's testimony on cross-examination (R. 1479) that the word

"gravel," indicating deposits thereof, on the Mississippi River Commission Chart of the Diamond Island Towhead Area (La. Exhibit No. 15—R. 996), appeared in **eleven** widely scattered places over the vicinity of Diamond Island Towhead, and not near any claimed "point of divergence" (whatever significance might be attached to such phrase); **and Smith's explanation of the significance of such eleven deposits of gravel**, viz:

> "A I don't know the exact origin of that gravel, I am sure **it must be either in place or upstream.** When I say that, I don't see the depths up in the bend at this time that would indicate it's eroding into the heavy gravels that underlie the flood plain, so it may be in this bend above, it may be some place where there is a local condition that will cause deepening of the channel **or it could be that these gravels were deposited here under some other condition."** (R. 1480)

Of course, "Point S" as fixed by the Master was primarily based on the last flow in the channel which permitted **navigation at low water**, and was not in accordance with *Arkansas v. Tennessee*, which fixed the test,

> "So long as that channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; . . . ."

Louisiana made two alternative contentions with respect to the accretions. First, it contended that all of the accretions south of the island had been formed to that part of the Louisiana shore (Bedford Bar) up river from the head of the final thalweg in the old channel (the point of division or boundary between the states fronting on the river)—and

such accretions had tailed down in front of, without being attached or connected to, the island. This first alternative is outlined by that part of Louisiana exhibit Number 1 (R. 891) which commences at page 12; and demonstrated by Plate I of Louisiana Exhibit Number 43 (R. 1398); and further detailed by the testimony, especially of Durham (R. 1033). There can be no question but that the bars did form by accretion to the right bank of Louisiana (Bedford Bar); up river from the head of the thalweg in the old channel, and that they did tail down as pictured in the plates and maps supporting Plate I of Louisiana Exhibit Number 43 (R. 1898). This being so, all of these bars belong to Louisiana.

The alternative contention of the State of Louisiana, with reference to these accretions, is that if the accretions that **formed in front of the island** (even though they had tailed down from the Louisiana shore) are to be considered Mississippi, and those accretions that are in front of Bedford Bar are Louisiana, then the accretions should be divided, by the right angle rule (which was the same rule adopted and used by the Master); however, Louisiana contends that the point of beginning for the division of the accretions and the application of the right angle rule should be **the head of the final thalweg of the old channel as shown on Louisiana Exhibit Number 36** (R. 1325), and **not** the **"Point S"** as held by the Master. Thus, the area in dispute under this alernative in this Court is shown on Plate 2 of Louisiana Exhibit Number 43 (R. 1398); such disputed area on such exhibit is the area shown in purple, that is, between the red line marked "Suter" which commences at "Point S," and the red line which commences at the head of the final thalweg of the old channel, which is just east of the head of the island. This area, which the Master has held is Mississippi land, and

which we contend is Louisiana land, contains approximately 3000 acres of land.

The above approximately 3000 acres here in dispute included the only land that was in dispute in the case of *Sharp & Stricker v. Learned*, 32 So. 2d 141, a case decided by the Supreme Court of the State of Mississippi in 1947, **which decision obviously precipitated the present suit.** Even though the Master held here that such decision was not binding on Louisiana, as Louisiana was not a party to such suit, **nevertheless, the Master adopted approximately the same boundary upstream from the island, as the Mississippi Supreme Court had fixed.** The opinion in that suit, on its face, indicates that the case turned on whether Diamond Island itself was in Louisiana or Mississippi, however, on analysis, it is seen from the opinion, that Sharp and Stricker, defendants in that suit, did not, at any time, claim the island, but only claimed those accretions in front of Sections 7, 8 and 9, Township 15 North, Range 14 East, Madison Parish, Louisiana, which accretions were upstream from the island and form part of said 3000 acres. The Mississippi Supreme Court's opinion "passed over" and did not mention, **though its decree covered**, how the boundary between the states could be extended upstream from the island for approximately a mile and a fraction. The opinion of the Mississippi lower court was affirmed by the cited opinion; and the lower court based its opinion as to the extension of the boundary upstream from the head of the island entirely on the testimony of the same Dr. Harold Fisk, who testified for the State of Mississippi in this case. Dr. Fisk there proposed that the boundary in the old channel, after the avulsion, **should be when 50% of the flow was still in the old channel** around the island. He did not then mention whether he intended low water or high water. Here are his exact

words, taken from Complainant's Exhibit Fisk 4, at page 45 (R. 46), viz:

> **"Mississippi-Louisiana Boundary:** If the Mississippi-Louisiana boundary is to be determined by the thalweg of the Mississippi River then that line **should be established when more than 50% of the total flow of the river followed the course around Diamond Island.** The thalweg marking more than 50% of the flow is the thalweg of Course A_1. This thalweg is therefore presented as the logical position to arbitrarily establish the Louisiana-Mississippi boundary. . . . **The boundary is considered to follow the A_1 thalweg eastward around (actually he means upstream from) Diamond Island as far as the fork in the thalweg east of B. M. Diamond Island at point X** (Plate 10)." (Emphasis supplied)

It is important to note that this Course A_1 (50% flow) on Fisk's Plate 10 (Fisk No. 4, Plate 10—R. 46) is almost identical to the boundary line (old thalweg) as fixed by the Master. The length of the line from the head of Diamond Island upstream to "Point S" is approximately the same distance as Fisk's "Point X," which is where Fisk said the thalwegs "divided" (whatever that connotes) and the boundary should be fixed "**when more than 50% of the total flow of the river followed" this Course A_1 "around Diamond Island.**" That all important and decisive case by this Court of *Arkansas v. Tennessee*, supra, was not even mentioned by the Mississippi courts when they adopted **this 50% flow through the old channel** theory. It is obvious that **this 50% flow through the old channel** theory of Dr. Fisk which was adopted by the Mississippi courts is in conflict with the holding of this Court in *Arkansas v. Tennessee*, that,

"So long as that channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; . . . ."

The Mississippi Supreme Court gave as an additional reason in support of its decree in the cited case that Mississippi had always exercised dominion and control over this land, whereas Louisiana had exercised none. This reason is equally without merit, as not only the record in this case reveals, but as the Special Master so found (Report 45).

Of course, Dr. Fisk at the hearing attempted to give the same testimony that he had given in his report from which we have quoted, but on objection by the State of Louisiana that the fixing of the States' boundary by Dr. Fisk was an invasion of the Court's prerogative, which objection was maintained by the Master, Dr. Fisk, very conveniently, without explanation, changed to his Course A_2, marked on his map (Plate 10 to Fisk No. 4—R. 46), as "main water flow through cut-off" to what he said was the "last low water flow" around the island (referring to Plate 10 of Fisk 4, R. 157), in this way, viz:

"A . . . . The portion of last low water flow through the island would be the position . . . marked by the brown line . . . ."

This brown line on Plate 10 of Fisk 4 (R. 46) is Course A_2 on Plate 10 and there marked "main water flow through cut-off." The phrase "main water flow" connotes that there was some other water flow if there was a "main" one, therefore, when Fisk labeled his chart "main water flo " he indicated that there was some flow in this Course A_2 in the old channel ev n though it was not the "main" flow. How then,

did he switch, without explanation, and say that this same channel was **the last** low water flow, meaning when the water ceased to flow, when he had previously said it had a flow which was not the "main" flow? Furthermore, this Plate 10 shows a green line which is marked by Fisk on the plate as "1882-1883—Entire low water flow through cut-off," obviously meaning that the low water flow had ceased in the green channel, but there yet remained such a channel for other than such low water flow, as he shows.

The important point about this testimony of Fisk is that the green line around the island on Plate 10 of Fisk 4, is the exact location of the final thalweg as contended for by the State of Louisiana, that is, the location of the old channel around the island when that channel ceased to be a running stream and there was no more erosion and accretion taking place therein. This green line on Plate 10 of Fisk 4 was labeled by Fisk himself as "Entire low water flow through cut-off." To emphasize, Fisk, on Fisk 4, Plate 8 (R. 46), shows channel deterioration by stages, **and again shows the last channel around the island (as uncolored)**. This last channel is his green line on his Plate 10 of Fisk 4 (R. 46); moreover, this last channel is exactly in the position contended for by Louisiana under the law of the case of *Arkansas v. Tennessee*, supra.

All of this but points up the legal question at issue, that is, is the boundary around the island to be as the Master fixes it as remaining in the channel **only** until it **"can no longer be used for navigation" at low water stages** and so projected upstream for a mile and a fraction to a point where there was a speculated "Point of Divergence" or "divided thalweg" (whatever those terms connote in law); or is the

boundary around the island to be as this Court decreed in *Arkansas v. Tennessee*, supra, to remain in the old channel,

> "So long as that channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; . . . ."

and the head of the final thalweg of this old channel to be the point of beginning of the state's boundary fronting on the river at the time; with the law applicable to accretions to control the ownership of accretions in front or attached to the land as so divided by this final channel?

IV.

BOUNDARY IN OAK BEND APPLICABLE TO DIAMOND ISLAND TOWHEAD AREA

The legal question involved here is identical with the one involved in fixing the boundary around Diamond Island. The question is to locate the southern boundary of the accretions we have hereinabove discussed, which boundary is in that old channel of the Mississippi River known as Oak Bend. This Oak Bend was that part of the Mississippi River that separated the accretions on the right bank (Bedford Bar—Louisiana) from the left bank (Diamond Point—Mississippi). In 1933 a man-made avulsive cut-off was made at the neck of Diamond Point, called "Diamond Cut-off 1933" on all of the charts. This cut-off became the main channel, with Oak Bend as the "old channel."

In Part V of the Special Master's Report, page 52, the States' boundary, in part, was suggested, viz:

"Thence running westward along the dead thalweg of the abandoned channel of the Mississippi River (lower Oak Bend) to a point that is . . . (S-5 Smith Exhibit 5).

"Thence leaving the dead thalweg of **the abandoned channel of lower Oak Bend . . . .**" (Emphasis supplied)

Such fixing of the boundary in "Oak Bend" was also discussed by the Master in his report (Report 50), and is premised on the testimony of the witness Smith, viz:

"Q When was it that you said according to your information Oak Bend ceased to flow at low water?

"A- The records show that it ceased to flow first in the low water of 1939 . . . ." (R. 1467)

The witness Smith took the year 1939 "as the year to arrive at the boundary" in Oak Bend (R. 1468). Smith Exhibit No. 11 (R. 875) in the first two paragraphs, suggesting the "boundary of Diamond Point," are the same two paragraphs above quoted from the boundary suggested by the Master. The boundary so suggested by the witness was the channel of Oak Bend as it existed in 1939 because that was when a low water on some particular day did not flow in Oak Bend. Contrast the conclusion of the witness that the channel was abandoned because there was no low water flow therein for some few days, with the photograph of this same Oak Bend Island made in 1939, Louisiana Exhibit No. 44 (R. 1472). The witness Smith marked with red between the letters "A" and "B" on the 1939 photograph where he said the "dead thalweg" was located (R. 1471) on this photograph. This photograph was not at flood stage (R. 1472), yet, Oak Bend, as marked thereon by the witness, was apparently as large a channel of the Mississippi River as there existed in

that vicinity. This Oak Bend Channel was in 1939, and yet remains a running stream, which is changed each year by erosion and accretion, for in accordance with Louisiana Exhibit No. 45 (R. 1474), "Gage Readings for 1953" of the Mississippi River at the Vicksburg gage, as interpreted by the witness Smith, Oak Bend, in the relatively low water year 1953, was a running stream carrying the waters of the Mississippi River, for the period from February 19, 1953, through June 17, 1953. That this channel was a running stream subject to be **and being** changed by erosion and accretion after the year 1939 was graphically demonstrated under cross-examination by the witness Smith in his Louisiana Exhibit No. 46 (R. 1485) showing the migration of Oak Bend Channel. Even Smith's suggested boundaries on his exhibit, Smith No. 5 (R. 679), shows Bedford Bar extended across and beyond his "thalweg" that he said "died" in 1939, which extension was the result of the current in this Oak Bend running stream causing erosion and accretion. In accordance with Louisiana Exhibit No. 46 (R. 1485) and Smith's testimony, this line along Range 76 moved (channel migrated) **approximately 1400 feet** in a southerly direction.

The Master's legal conclusion on this channel in Oak Bend was, viz:

> ". . . the boundary became fixed in the middle of the thalweg of this channel as a result of the artificial avulsion caused by Diamond Cut-off when current ceased to flow in Oak Bend Channel by at least 1940. **Navigation could not use the channel at that time**, the water was stagnant in the old channel except in times of high water. It was no longer a part of the main river which continued to flow at all stages with a swift current through the cut-off carrying the commerce of the river."

"While it is true that there has been some erosion by high water flow in the channel since 1940 to the extent of probably **⅓ of a mile**, I do not think that this has caused any change in the State boundary but is merely an effect of an avulsion." (Report 50)

What has navigation to do with a boundary becoming fixed in a channel? And what has low water, normal level of water, high water, or for that matter, flood water, to do with the legal issue? This Court has said that the legal question is "So long as that channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; . . . ." The Master differs, and disregards the decision of this Court, for he said that this erosion of ⅓ of a mile "has no effect." We submit that he is in error. *Arkansas v. Tennessee*, supra.

Conclusion as to Diamond Island Towhead Area

We submit that:

(1) The boundary in the old channel around Diamond Island should be fixed in the last channel, which was surveyed on the ground and shown in Louisiana Exhibit No. 36 (R. 1325), and the point shown thereon as the head of the final thalweg should be the upstream end of the island, the point where the boundary between the states in the old channel commences.

(2) On the disposition of the accretions formed in the vicinity of this Diamond Island Towhead and attached to Bedford Bar (Louisiana), which tailed down in front of

Diamond Island, we submit that all of them are in and form a part of the State of Louisiana.

(3) As the alternative claim of Louisiana on the disposition of the accretions formed in the vicinity of this Diamond Island Towhead, in the event that part of the same belong to Mississippi, because they were formed in front of Diamond Island, we submit that the same should be divided between the states on the right angle rule, to each known successive thalweg, starting at the point shown on Louisiana Exhibit No. 36 (R. 1325) as the head of the final thalweg in the old channel around the island.

(4) We submit that the southern boundary of the Diamond Island Towhead Area in Oak Bend Channel is yet a live channel and will remain so as long as it remains a running stream, and the boundary marked by it is subject to be changed by erosion and accretion.

PART B.

DIAMOND POINT AREA

Questions Presented for Review

1. The burden of proof to show which side the thalweg of a boundary stream an island is formed, being on the State of Mississippi in this case as plaintiff, and the evidence not only not showing which side of the thalweg of the boundary stream the island was formed, but the strongest evidence being that it probably was formed on the Louisiana side of such boundary thalweg, the Master erred in fixing the southerly boundary of Diamond Point as including this island.

2. Prescription is not applicable to the island, for first, it was only formed in approximately 1925, and there was no evidence of possession of the island itself in Mississippi as distinguished from Diamond Point, and the island is not a part of Diamond Point.

Statement of the Case as to the Diamond Point Area

The State of Louisiana, at the pre-trial conference at Birmingham, stipulated (Exhibit "B"—R. 4), viz:

> "Pursuant to authority of letter from Hon. Fred S. LeBlanc, Attorney General of the State of Louisiana, dated July 2, 1954, copy of which is annexed hereto, the State of Louisiana, by E. H. Lancaster and Ashton L. Stewart, Special Assistant Attorneys General, admits the area known as Diamond Point is not located within the State of Louisiana and Louisiana does not deny that this area is located in the State of Mississippi." (Tr. p. 8).

The authority to make such stipulation referred to therein and annexed thereto (Exhibit "B"—R. 4) contained the following limitation, viz:

> "It is understood, however, that no agreement, binding on the State of Louisiana or me, as Attorney General, shall be made on the basis of stipulations which undertake to fix the exact boundaries of the two states in, at or within the vicinity of Diamond Point, that question to be left open for additional stipulation, if possible, pursuant to an order that you might later make in that particular" (R. 11)

Therefore, in view of such stipulation, the location of

the boundaries of Diamond Point was the only issue as to the Diamond Point feature of the case.

The location of the boundary between Diamond Point and Bedford Bar has been discussed hereinabove. The only other portion of the boundary that we need discuss is whether the Diamond Point boundary on the southerly side thereof includes or excludes the island that is shown in that locality on the 1930 panel of Mississippi River Commission chart—Fisk Exhibit No. 10 (R. 303) (which is also Fisk Exhibit No. 13—R. 315). **This is the island that was not colored by Fisk**, the principal witness relied on by Mississippi, **as being part of Diamond Point on the 1930 panel of Fisk No. 10** (R. 303).

Argument Applicable to Southern Boundary of Diamond Point

I.

BURDEN OF PROOF

The burden of proof here to show that this island was a part of Diamond Point was on the State of Mississippi. In a similar situation in the case of *Kansas v. Missouri*, 322 U.S. 213, 64 S.Ct. 975, 88 L.Ed. 1234, where the question was to which shore an island belonged, this Court said, viz:

> "Both by her position as complainant and on the facts, Kansas has the burden of proof in this case.
>
> "....
>
> "The evidence on this controlling issue unfortunately is not as free from conflict or doubt as we might wish.

But it cannot be said, when account is taken of all the evidence, both oral and documentary, that a preponderance sustains Kansas' view that the main channel ever changed to the Missouri side. **Kansas' burden required preponderant proof. She has not made it."**

II.

MISSISSIPPI HAS NOT CARRIED BURDEN OF PROOF AS TO LOCATION OF ISLAND BELOW DIAMOND POINT

The Master, in holding that Mississippi had fulfilled the burden of proof, referred to Mr. Durham's testimony that the available maps showed the island on the Mississippi side of the thalweg (Report 48-49). But a review of Mr. Durham's testimony reveals that he also said such maps were not sufficient to show the situation at the time of the development of the island, **and were inconclusive as to the all important point as to where the thalweg was when the island first formed.** Mr. Durham interpreted these various maps (R. 1082-1102). The testimony of Mr. Durham gives this history indicating that the thalweg was north of the island (the Master having held it was south) when it was formed. First, the map evidence in 1913 (Mississippi River Commission, Chart No. 51), La. Exhibit No. 27, R. 1094, shows that there was not an island in this locality at such time—and as testified by Durham.

> "A . . . , the left bank is labeled 'bank caving, . . . , bank caving . . . .'" (R. 1094)

and he further says,

"A . . . so that on the 1913 course, which makes a bend in the Newton Bend area, the thalweg is against the left bank in 1913."

The left bank at this point is the north bank. The next available map with complete data (R. 1086) is the Mississippi River Commission Survey in 1925-1926, Louisiana Exhibit No. 26, which, for the first time on any survey, shows the island in question. At this time, Durham interprets the map, showing two channels around the island,

"In general, the deepest thalweg zone is to the south of the island in 1925-26." (R. 1092-3)

Then to show that the only evidence in the record indicates the island was first formed on the Louisiana side of the deepest thalweg, Durham says

". . . the channel to the north of the island is less well developed in 1929-30 (Louisiana Exhibit 25, R. 1085) than it is on this particular chart, the 1925-26 map (La. Exhibit No. 26, R. 1086), so that interpretation would be that the channel to the north of the sand bar is in the process of abandonment whereas the channel to the south of the sand bar is taking the main flow." (R. 1087)

Then the witness referred to the only other information that was available, as to the location of the thalweg at the time this island was formed, and that information was a Mississippi River Commission Chart showing "Bank Lines, Mississippi River, Oak and Newtown Bends" (Louisiana Exhibit No. 28, R. 1095), which shows the bank lines between the period of 1913 and 1925 for the years 1920 and 1924, which information was not available on any other survey. This last

chart, however, gave only bank line information and no other. The witness Durham testified of these bank lines, viz:

"A . . . the left bank around Newtown Bend—was caving in 1913 and therefore retreating. By 1920, as indicated by this chart—(La. Exhibit No. 28, R. 1095)

"A —the left bank had retreated to this position—

"Q Which the witness marks or traces in lavender.

"A —and indicates the retreat of the bank. There was little additional retreat of the bank in the next four years. The left bank in 1924 I indicate in brown so that the main retreat in this area was accomplished in the interval between 1913 and 1920." (R. 1096)

Thus, the witness Durham demonstrates by Mississippi River Commission charts, that the north bank in the vicinity of the island was a retreating bank, at least through the time of the bank line survey of 1924 shown on La. Exhibit No. 28 (R. 1095); and the next map, 1925-26 survey, La. Exhibit No. 26 (R. 1086), shows the formation of the island with a thalweg on both sides; **but what is most significant is the 1926 bank line on La. Exhibit No. 28 (R. 1095), which shows that this left bank had suddenly (after the 1924 bank line survey and by the time of the 1925-26 survey) not only stopped retreating, but had become an advancing bank for a very considerable distance, even more advance than there had been retreat from 1913.** The next maps, especially the 1929-30 map, La. Exhibit No. 25 (R. 1085) shows the north channel around the island to be a closing channel. We submit that

all of this information shows that Durham testified that the island was formed on the Louisiana side of the thalweg.

When the whole testimony of Durham and the maps are considered, the Master then had only the bare statement of Dr. Fisk that the island, in his opinion, was formed north of the thalweg (Report 49) as the only remaining evidence to bottom his opinion that the thalweg was north of the island when the island first formed. However, Fisk in marking his Exhibit No. 10 (R. 303) at another part of his testimony, **did not color the island as being in Diamond Point.** Thus, even Fisk's opinions conflicted. Furthermore, Fisk gave no reasons for either of his diverse opinions. And we submit that an opinion without reasons is of very little value. There were no other charts available to Fisk than to the witness Durham; therefore, we believe that the opinion of Fisk, given without reasons, on this point is not such evidence as will support the Master's findings, especially as the maps themselves prove otherwise.

But enough of what the Master said, let us turn to the evidence.

Aside from the normal migration and extension of Diamond Point, three natural events occurred which affect the establishment of its present boundaries. Consecutively, they are:

(1) The northwestward migration of the point until the river on its southwestward side broke or cut into the old Palmyra Channel, abandoned since the Davis Cut-off of 1867. This event is commonly referred to as the Killikranka Cut-off. (See 1913 chart on Fisk No. 10—R. 303)

(2) The formation of an island on the Louisiana side of

the then existing thalweg in the channel of the river south of Diamond Point prior to 1926, and the subsequent abandonment of the former main channel between this island and Diamond Point.

(3) The dredging of an artificial cut-off across the eastern neck of Diamond Point in 1933, and the simultaneous closing of the channel south of Diamond Point by dikes.

The Killikranka Cut-off in 1904 allowed the diversion of a portion of the normal river flow around Davis Island to the west through the old Palmyra Channel; **this reduced the flow of water through the regular channel downstream from the Killikranka breakthrough, along the south side of Diamond Point.** As Diamond Point migrated progressively westward, changes in alignment of the Oak Bend Channel to Palmyra Channel, which it intersected, became more advantageous to greater flow through Palmyra Channel and reduced flow through the channel around Newtown Bend, south of Diamond Point.

One of the results of this reduced flow was the formation of an island bar about 1925 (Report 48) (La. Exhibits 26 and 26-A—R. 1086) in the river **south of the thalweg or boundary channel**, as it had clearly existed up to that time. Another result was the left bank stopped retreating and advanced. Louisiana contends that this island initially formed on the Louisiana side of the existing thalweg, therefore, it is not a part of Diamond Point, but to the contrary, belongs to the State of Louisiana. The pertinent charts demonstrating that this island formed south of the boundary thalweg are:

Mississippi River Commission Chart No. 51 (Complainant's Exhibit 12—R. 110).

Mississippi River Commission Chart No. 2181, Sheet 67, showing bank line surveys of 1913, 1920, 1924, 1926 and 1929 in the pertinent area (Louisiana Exhibit No. 28—R. 1095).

Mississippi River Commission Hydrographic Survey, Field Sheets No. 91 and 93, 1925-25 (Louisiana Exhibits No. 26 and 26a respectively—R. 1086).

U. S. Engineers, Second District, New Orleans, Low Water Survey 1929-30, Sheets 10 and 11 (Louisiana Exhibits No. 25a and 25 respectively—R. 1085).

U. S. Engineers, Second District, New Orleans Hydrographic Survey, 1932-33, Sheet 8 (Louisiana Exhibit No. 29—R. 1101).

The 1913-15 chart (Complainant No. 12—R. 110) shows the Diamond Point left bank caving in the vicinity of Newtown Bend along the outside of the meander. **The data shows the thalweg is against the caving, or Mississippi, side of the stream as would be expected in such a situation. This is the only thalweg present and would, therefore, mark the boundary line at that time.** The 1920 and 1924 bank lines (on Louisiana Exhibit No. 28—R. 1095), **show continued bank retreat in the area.** Although no hydrographic data is available to substantiate the fact, **the thalweg undoubtedly remained adjacent to this north or left bank under such a situation, which is the normal situation**, because the bank was retreating at such place.

The next available evidence, the hydrographic chart of 1925-26 (Louisiana Exhibit No. 26 and 26a—R. 1086), shows this boundary thalweg still adjacent to the north, or Mississippi, bank of the channel through the Newtown Bend area.

It also depicts an island sand bar **south of this established boundary thalweg** and a new thalweg formed to the south of this island. On this map, the two channels are virtually of equal depth, but with the new southern thalweg slightly deeper and undoubtedly carrying slightly more flow than the boundary thalweg. **The most significant fact on this bank line survey (La. Exhibit No. 28—R. 1095), however, is that the bank in 1925-26 had not only stopped retreating, but had advanced to beyond where the 1913 bank had been. This was sudden; and at the same time the island formed.**

The next map, 1929-30 (Louisiana Exhibit No. 25 and 25a—R. 1085), shows a considerable enlargement of the sand bar island and the adoption of the southern channel as the main flow, to the virtual abandonment of the original north channel in which Louisiana contends the state boundary still remained.

The causative factor, in the sudden change from a retreating to an advancing bank, and in the formation of the island south of the original river main channel, and the subsequent adoption of the new channel to the south of the island, is the deflection of a greater flow of water down the Palmyra Channel to the west around Davis Island. The consequent reduced flow south of Diamond Point around Newtown Bend tended to seek a course with meanders of tighter curvature, thus causing the island to be formed and the abandonment of the old north thalweg around the island and the adoption of a new southern channel within the span of years from 1924 to 1930. The left bank line was also stopped from retreating and caused to advance.

Louisiana contends **that the north channel was the only thalweg position on the 1913 chart and remained so until**

1924-25, when the left bank stopped retreating and advanced, and at the same time the island formed. After the formation of the island and the subsequent new southern thalweg, **the boundary between Louisiana and Mississippi remained in the original thalweg to the north of the island.** Consequently, the island and the new thalweg are within the State of Louisiana inasmuch as the state boundary has remained in the position of the final channel to the north side of the island **when the waters therein last closed to flow.** This last channel can easily be traced in the field or on maps today. Generally speaking, it lies as marked (R. 454) by complainant's witness, Hyland, by a red line on Complainant's Exhibit No. 23 (R. 110). It also lies between the Diamond Point area shaded by complainant's witness, Fisk, in pink and the offshore island to the south on the 1930 panel of Fisk No. 10 (R. 303); it is marked also by Defendant's witness, Durham, on the 1932-33 hydrographic chart (Louisiana Exhibit No. 29—R. 1101) by a red line labeled "B".

The boundary of Diamond Point has become stationary in successive segments. The thalweg marking the boundary immediately north and southwest of Newtown Bend was final by the formation of an island south of this thalweg, within Louisiana, and the subsequent abandonment by 1930 of the boundary thalweg so that it yet remains traceable in the field. Construction of a dike along the lower reaches of the new southern channel, soon after dredging of Diamond Cut-off in 1933, caused cessation of flow entirely south of Diamond Point. At that time, the river segment referred to as Kellogg's Lake in the testimony became abandoned from the head of the previously abandoned channel north of the island upstream to the point where the channel split to course down both Palmyra and Kellogg's Lake.

Subsequent to this event in 1933, Oak Bend Channel north of Diamond Point has been in the process of abandonment. The latest Oak Bend course shown on an official map, the aerial photograph mosaic of December, 1953 (Sessions No. 1—R. 371) is clearly shown on that map. Also, the abandoned channels south of Diamond Point are also clearly indicated. Louisiana holds, however, that the boundary segment from the main Mississippi River at the head of Diamond Cut-off downstream to the head of Kellogg Lake, which is the northern boundary of Diamond Point, is still a live and moving thalweg, although in the final stages of abandonment. This segment has been traced in red as it existed in December, 1953, by witness Durham on the aerial photograph mosaic of December, 1953. (Sessions No. 1—R. 371).

If map evidence had been available covering the period of the first formation of this island south of Diamond Point in Newtown Bend, then it would be clear as to which side of the island it was when the island first began to form; but no such map was offered in evidence.

The situation then, is that the map evidence prior to the formation of the island shows the thalweg, in the place where the island formed, on the north side of the channel. The next map shows a divided flow, with a slightly greater flow to the south of the island. Later maps show the north channel finally abandoned. In other words, the map evidence is that of a closing channel on the north side of the island. **But the most significant evidence is that revealed by the bank lines chart, La. Exhibit No. 28 (R. 1095), which shows the left bank retreating in 1920 and 1924, and by 1925-26, when the island is first shown, this left bank after the 1924 survey, and on the 1925-26 survey, was advancing, and not retreating.**

Under such circumstances, the maps tell the story of the main thalweg being to the north of the island when the island was first formed. This was backed up by the testimony of the witness presented by the State of Mississippi, Mr. John L. Hyland (R. 454) when he excluded this island in indicating Diamond Point on Complainant's Exhibit No. 25 (R. 454).

Mississippi had the burden of proof, and it has failed to maintain it; we submit that the evidence shows the island in Louisiana.

Accordingly, we submit that the boundary of Diamond Point in this area is north of the island—and though such channel has now been abandoned, it is easily traceable in the field and on maps, and can be surveyed.

III.

POSSESSION

The Master stated that the prescription claim of more than 50 years to Diamond Point was good. He obviously was not referring to this small island, which first appeared on maps in 1925-26 (Louisiana Exhibit No. 26—R. 1086) and was still an island in 1930 (Louisiana Exhibit No. 25—R. 1085). There were no acts of possession shown on this particular island by the evidence, though it is now attached to Diamond Point, a part of Mississippi, and to Sargent's Point, a part of Louisiana. The many witnesses for the State of Mississippi who testified, at no time singled out this island as having been possessed by Mississippi—they all spoke of Diamond Point being possessed. We submit that prescription is not applicable to this island, as it was never a part of Diamond Point.

Conclusion as to Diamond Point Area

We submit that this island is part of Louisiana, and that the boundary in the now abandoned channel to the north of the island is readily traceable in the field and on maps and should be fixed by a survey as the boundary between the states in this Diamond Point Area.

Respectfully submitted,

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CERTIFICATE

This is to certify that copies of the foregoing brief have been served upon counsel of record of the State of Mississippi by mail, deposited in a United States mail box, with first class postage prepaid, addressed to counsel of record of the State of Mississippi at the post office address listed.

Baton Rouge, Louisiana, May 6, 1955.

JOHN L. MADDEN
Assistant Attorney General
State of Louisiana

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 11, Original

STATE OF MISSISSIPPI,

Plaintiff,

versus

STATE OF LOUISIANA,

Defendant

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI IN SUPPORT OF THE SPECIAL MASTER'S REPORT AND RESPONDING TO EXCEPTIONS THERETO OF THE STATE OF LOUISIANA.

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SUPREME COURT OF THE UNITED STATES

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No. 11, Original

STATE OF MISSISSIPPI,

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BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI IN SUPPORT OF THE SPECIAL MASTER'S REPORT AND RESPONDING TO EXCEPTIONS THERETO OF THE STATE OF LOUISIANA.

To the Honorable Supreme Court of the United States of America:

Jurisdiction

This is an original action brought by the State of Mississippi against the State of Louisiana for the purpose of having this Court determine and fix the boundary between the two states in an area about fifteen miles in length on the Mississippi River described in Paragraph (8) of the Bill of Complaint. This area is about sixteen miles below Vicksburg in Warren County, Mississippi. Jurisdiction of this Court is conferred by Article III, Section 2, of the Constitution and by Section 1251, Title 28, U.S.C.A. Jurisdiction is not in issue.

The Reference to the Special Master

This Court by its Order of October 26, 1933, 346 U.S. 862; referred this cause to D. K. McKamy, Esquire, of Birmingham, Alabama as Special Master, with authority to take such evidence as might be introduced and such as he might deem necessary to call for; and directed the Master to find the facts specially and state separately his conclusions of law thereon, and submit the same to this Court with his recommendations for a Decree. The Master has so done.

Mississippi has filed no exceptions to the findings of fact, conclusions of law or recommended decree as submitted by the Special Master.

Louisiana has filed exceptions to some of the findings of fact of the Special Master. Louisiana makes no exception to any of the conclusions of law as stated by the Special Master, but claims the Master disregarded such conclusions of law in two instances.

Procedural Rules on Exceptions in Case of Original Jurisdiction

Under the rules of procedure applicable to exceptions to a master's report in cases of original jurisdiction, the master's report should be accepted unless clearly erroneous.

> "The form of pleadings and motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, 28 U.S.C.A., and in other respects those rules, where their application is appropriate, may be taken as a guide to procedure in original actions in this court."

Supreme Court Rules, Part III. Original Jurisdiction. Rule 9(2).

"In an action to be trial without a jury the court shall accept the master's findings of fact unless clearly erroneous."

Rules of Civil Procedure, Rule 53(e)(2).

The principles embodied in these rules have been recognized, followed and enforced by this Court in cases prior to and since the adoption of the rules.

Girard L. Ins. & T. Co. v. *Cooper,* 162 U. S. 529, 16 S. Ct. 879, 40 L. Ed. 1062;
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Arkansas v. *Tennessee,* 310 U. S. 563, 60 S. Ct. 1026, 84 L. Ed. 1362;
Kansas v. *Missouri,* 322 U. S. 213, 64 S. Ct. 975, 88 L. Ed. 1234.

Diamond Point and Diamond Island Towhead Admitted by Louisiana to be in Mississippi

The pleadings of Louisiana claimed all of Diamond Point and Diamond Island Towhead. However, prior to the hearing before the Master, Louisiana admitted these areas were

in the State of Mississippi in two separate stipulations viz.:

"It is admitted by the State of Louisiana that subsequent to the entry of the States of Louisiana and Mississippi into the Union, a point bar developed from the Mississippi shore, moved in a North and Westerly direction from its original position, forming a point bar. That subsequently a portion, or the tip, of that point bar was cut off and now the remnant of the portion, or tip, remains on the western side of the present channel of the Mississippi River, and that portion, or piece, of land on the western side in the vicinity of what is known as Diamond Island Towhead is a part of the State of Mississippi." (Tr. 5, 6.)

"Pursuant to authority of letter from Hon. Fred S. LeBlanc, Attorney General of the State of Louisiana dated July 2, 1954, a copy of which is annexed hereto the State of Louisiana, by E. H. Lancaster and Ashton L. Stewart, Special Assistant Attorneys General admits the area known as Diamond Point is not located within the State of Louisiana and Louisiana does not deny that this area is located in the State of Mississippi." (Tr. 8.)

The Questions Presented for Review

1. Are the special findings of fact as reported by the Special Master to which Louisiana has taken exception supported by competent and credible evidence?

2. Has the Special Master correctly applied his conclusions of law to the facts?

3. Is the recommended decree in accordance with the facts and the law of this case?

Summary of Argument

1. The Special Master has stated the law of this case correctly and has applied correctly his conclusions of law to the facts.

2. The special findings of fact as reported by the Special Master, including those to which Louisiana has taken exception, are supported by competent and credible evidence and are in accordance with the long line of decisions of this Court in like cases.

3. In taking exceptions to the findings of fact and conclusions of law as stated in the report of the Special Master, Louisiana ignores the "rule of the thalweg" and misconceives the meaning of the language of this Court as employed in other like cases.

4. Louisiana refuses to follow the "Thalweg Doctrine" as announced by this Court as the basis for establishing the boundary between the states.

5. Louisiana seeks in this case to substitute its own definition of the term "thalweg" for the legal definition of the term adopted by this Court. Louisiana's definition of the term is one wholly unrelated to navigation in any way.

6. Louisiana ignores the applicable rules of law, formerly announced by this Court, in locating and determining the boundary between the states.

7. Louisiana predicates its exceptions to the Master's report on a false premise.

8. The recommended decree contained in the report of the Special Master is in accord with the law and the evidence in this case.

Argument

The Applicable Law of This Case

For a proper consideration of this cause, the law as stated in the Master's report, which is not disputed nor excepted

to by Louisiana or by Mississippi, is here restated for the convenience of the Court:

1. When a *navigable* river forms the boundary separating one state from another, in the absence of a special convention between the states, or long use equivalent thereto, the thalweg or middle of the main *navigable* channel is to be taken as the true boundary line.

Iowa v. *Illinois*, 147 U.S. 1, 13 S. Ct. 239, 37 L. Ed. 55;
Arkansas v. *Tennessee*, 246 U.S. 158, 38 S. Ct. 301, 62 L. Ed. 638;
Louisiana v. *Mississippi*, 202 U.S. 1, 26 S. Ct. 408, 50 L. Ed. 913;
New Jersey v. *Delaware*, 291 U.S. 361, 54 S. Ct. 407, 78 L. Ed. 847.

2. The thalweg is defined as meaning the middle of the main *navigable* channel, *the track taken by boats in their course down the stream*, which is that of the strongest current.

New Jersey v. *Delaware*, 291 U.S. 361, 54 S. Ct. 407, 78 L. Ed. 847;
Iowa v. *Illinois*, 147 U.S. 1, 13 S. Ct. 239, 37 L. Ed. 55;
Louisiana v. *Mississippi*, 202 U.S. 1, 26 S. Ct. 408, 50 L. Ed. 913;
Arkansas v. *Mississippi*, 250 U.S. 39, 39 S. Ct. 422, 63 L. Ed. 832;
Arkansas v. *Tennessee*, 269 U.S. 152, 46 S. Ct. 31, 70 L. Ed. 206.

3. Where the course of the boundary stream changes through the operation of the natural and gradual proc-

ess of erosion and accretion, the boundary follows the stream and remains the varying center of the channel.

New Orleans v. *United States*, 10 Peters 662;
Nebraska v. *Iowa*, 143 U.S. 359, 12 S. Ct. 396, 36 L. Ed. 186;
Missouri v. *Nebraska*, 196 U.S. 23, 25 S. Ct. 155, 49 L. Ed. 372;
Arkansas v. *Tennessee*, 246 U.S. 158, 38 S. Ct. 301, 62 L. Ed. 638.

4. When, however, from any cause, natural or artificial, a boundary river suddenly leaves its old channel and seeks a new bed, this sudden and rapid change is termed an avulsion and the resulting change works no change of boundary, which remains in the middle of the old channel, although no water may be flowing in it, and *irrespective of subsequent changes in the new channel*.

New Orleans v. *United States*, 10 Peters 662;
Jefferis v. *East Omaha Land Co.*, 134 U.S. 178;
Nebraska v. *Iowa*, 143 U.S. 359, 12 S. Ct. 396, 36 L. Ed. 186;
Missouri v. *Nebraska*, 196 U.S. 23, 25 S. Ct. 155, 49 L. Ed. 372;
Arkansas v. *Tennessee*, 246 U.S. 158, 38 S. Ct. 301, 62 L. Ed. 638;
Louisiana v. *Mississippi*, 282 U.S. 458, 51 S. Ct. 197, 75 L. Ed. 459.

5. In case of an avulsion, so long as the old channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; but when the water becomes stagnant, the effect of

these processes is at an end; the boundary then becomes fixed in the middle of the channel (as defined by the Supreme Court) *and the gradual filling up of the bed that ensues is not to be treated as an accretion to the shores but as an ultimate effect of the avulsion.* The emergence of the land, however, may or may not follow, and *it ought not in reason to have any controlling effect upon the location of the boundary* line in the old channel.

Arkansas v. *Tennessee*, 246 U.S. 158, 38 S. Ct. 301, 62 L. Ed. 638.

6. The principle of prescription and acquiescence in determining the boundary between states has been sustained and has received repeated recognition by the Supreme Court.

Arkansas v. *Tennessee*, 310 U.S. 563, 60 S. Ct. 1026, 84 L. Ed. 1362;

Rhode Island v. *Massachusetts*, 4 Howard 591, 11 L. Ed. 1116;

Louisiana v. *Mississippi*, 202 U.S. 1, 26 S. Ct. 408, 50 L. Ed. 913;

Virginia v. *Tennessee*, 148 U.S. 503, 13 S. Ct. 728, 37 L. Ed. 537;

Maryland v. *West Virginia*, 217 U.S. 1, 30 S. Ct. 268, 54 L. Ed. 645;

Vermont v. *New Hampshire*, 289 U.S. 593, 53 S. Ct. 708, 77 L. Ed. 1392;

Michigan v. *Wisconsin*, 270 U.S. 295, 46 S. Ct. 290, 70 L. Ed. 595.

7. Where an island is formed in a *navigable* stream which is the boundary between states, the island be-

longs to the state situated on the side of the thalweg on which the island is formed.

Kansas v. *Missouri*, 322 U.S. 213, 64 S. Ct. 975, 88 L. Ed. 1234;

City of St. Louis v. *Rutz*, 138 U.S. 226, 34 L. Ed. 911.

8. If an island grows by the addition of alluvion till it reaches the mainland, such new made land will not become the property of the shore owner, but belongs to the owner of the island.

Arkansas v. *Tennessee*: 310 U.S. 563, 60 S. Ct. 1026, 84 L. Ed. 1362.

9. The degree of proof to fix a boundary between states where a channel of river forming the boundary is abandoned is such certainty as is reasonable as a practical matter, having regard to the circumstances.

Arkansas v. *Tennessee*, 269 U.S. 152, 46 S. Ct. 31, 70 L. Ed. 206.

10. Burden of proof is on the State of Mississippi, as the complainant.

Kansas v. *Missouri*, 322 U.S. 213, 88 L. Ed. 1234, 64 S. Ct. 975.

(Emphasis supplied.)

Louisiana contends that the Master has disregarded his stated Conclusions of Law Numbers 3 and 5. It will readily be perceived that what Louisiana means is that it does not agree with the interpretation placed by the Master upon his Conclusions Numbers 3 and 5, and does not agree with the Master's application of the law to the special findings

of fact in this case. The error is that of Louisiana and not of the Master, brought about by Louisiana's refusal to apply the rule of thalweg as announced by this Court; its apparent lack of understanding of that rule; and the insistence of Louisiana upon its newly conceived theory of "effective flow" at high water as effecting a change in the boundary between the states after such boundary has become fixed in the thalweg of the old channel of the river as a result of the occurrence of an avulsion.

The fallacy of the argument here advanced by Louisiana, as same was urged throughout the entire hearing in this cause before the Master, is succinctly stated by the Master in his report (p. 9) in commenting upon the quotation from the opinion of this Court in the case of *Arkansas* v. *Tennessee*, 246 U.S. 158, 38 S. Ct. 301, 62 L. Ed. 638, viz.:

> "Attorneys for the State of Louisiana contend that under this decision the boundary does not become fixed after an avulsion until there is no 'effective flow' in the old channel. By 'effective flow' they mean that if, at any stage of the river from extreme low to high flood, any water flows in the old channel in sufficient amount and force to cause erosion or accretions in the old channel, then the boundary has not become fixed. Under this contention, the boundary is still subject to change in the old channel during the periods of extreme flood if any erosion is caused in that channel or any accretions are added."

The falsity of the premise upon which the entire argument of Louisiana is predicated in this case results from its refusal to relate the term "thalweg" to navigation in any respect whatsoever. This is demonstrated throughout the

record in this cause not only by the arguments of counsel for the State of Louisiana but by the testimony of the witnesses for that state.

The Thalweg Doctrine

The changes in the courses of the Mississippi River which brought about this litigation between the States of Mississippi and Louisiana were changes caused by avulsions, one natural and the other artificial. When, from either cause, natural on the first occasion and artificial on the other, the river left its old main channel and sought a new one, this sudden and rapid change, termed an avulsion, resulted in no change of boundary, which remained in the middle of the old navigable channel, although no water may be flowing in it, and irrespective of subsequent changes in the new channel.

The above statement is based upon the rule of the thalweg which has been recognized and applied in the earliest decisions of this Court involving questions of boundaries between the states of the Union bordering on navigable rivers.

Handly's Lessee v. *Anthony, et al.*, 5 Wheaton 374, 5 L. Ed. 113;

Missouri v. *Kentucky*, 11 Wall. 395, 20 L. Ed. 116;

Indiana v. *Kentucky*, 136 U.S. 479, 10 S. Ct. 1051, 34 L. Ed. 329;

St. Louis v. *Rutz*, 138 U.S. 226, 11 S. Ct. 337, 34 Ed. 941;

Nebraska v. *Iowa*, 143 U.S. 359, 12 S. Ct. 396, 36 L. Ed. 186.

Since the case of *Iowa* v. *Illinois*, 147 U.S. 1, 13 S. Ct. 237, 37 L. Ed. 55, the rule of the thalweg has not been open to question, for therein that rule was stated, declared

and settled by the opinion of the Court by Mr. Justice Field, from which we now quote:

> "When a navigable river constituted the boundary between two independent states, the line defining the point at which the jurisdiction of the two separates is well established to be the middle of the main channel of the stream. The interest of each state in the navigation of the river admits of no other line. The preservation by each of its equal right in the navigation of the stream is the subject of paramount interest. It is, therefore, laid down in all the recognized treatises on international law of modern times that the middle of the channel of the stream marks the true boundary between the adjoining states up to which each state will on its side exercise jurisdiction. . . .
>
> " . . .
>
> " . . . We therefore hold, in accordance with this view, that the true line in navigable rivers between the states of the Union which separates the jurisdiction of one from the other is the middle of the main channel of the river. Thus the jurisdiction of each state extends to the thread of the stream, that is, to the 'mid-channel', and, if there be several channels, to the middle of the principal one, or, rather, the one usually followed."

In the case of *Arkansas* v. *Tennessee*, 246 U.S. 158, 38 S. Ct. 301, 62 L. Ed. 638, in commenting upon the opinion rendered in the case of *Iowa* v. *Illinois* (supra), this Court, speaking through Mr. Justice Pitney, said:

> "The rule thus adopted, known as the rule of the 'Thalweg' has been treated as set at rest by that decision, *Louisiana* v. *Mississippi*, 202 U.S. 1, 49; *Wash-*

ington v. *Oregon*, 211 U.S. 127, 134; 214 U.S. 205, 215. The argument submitted in behalf of the defendant state in the case at bar, including a reference to the notable recent decision of its supreme court in *State* v. *Muncie Pulp Co.* (1907), 119 Tenn. 47, has failed to convince us that this rule ought now, after the lapse of twenty-five years, to be departed from."

The rule of the thalweg has never been departed from and has been consistently adhered to.

Missouri v. *Nebraska*, 196 U.S. 23, 25 S. Ct. 155, 49 L. Ed. 372;

Louisiana v. *Mississippi*, 202 U.S. 1, 26 S. Ct. 408, 50 L. Ed. 913;

Washington v. *Oregon*, 211 U.S. 127, 53 L. Ed. 118, and on rehearing, 214 U.S. 205, 29 S. Ct. 361, 53 L. Ed. 969;

Arkansas v. *Mississippi*, 250 U.S. 39, 39 S. Ct. 422, 63 L. Ed. 832;

Minnesota v. *Wisconsin*, 252 U.S. 273, 40 S. Ct. 313, 64 L. Ed. 558;

Louisiana v. *Mississippi*, 282 U.S. 458, 51 S. Ct. 197, 75 L. Ed. 459.

A most exhaustive and scholarly discussion of the rule of the thalweg or "thalweg doctrine" is contained in the opinion of this Court rendered by Mr. Justice Cordozo in the case of *New Jersey* v. *Delaware*, 291 U.S. 361, 54 S. Ct. 407, 78 L. Ed. 847.

In further discussing the rule of the thalweg as related to an avulsion, this Court has said:

> "The rule of the thalweg rests upon equitable considerations and is intended to safeguard to each state equality of access and right of navigation in

the stream. (Cases cited). The rule yields to the doctrine that a boundary is unaltered by an avulsion and in such case, in the absence of prescription, the boundary no longer follows the thalweg but remains at the original line although now on dry land because the old channel has filled up. (Cases cited)."

Arkansas v. *Tennessee*, 310 U.S. 563, 571, 60 S. Ct. 1026, 84 L. Ed. 1362, 1367.

Louisiana Admits Ignoring the Thalweg Doctrine Announced by this Court

Louisiana has predicated its case principally upon the testimony of Mr. Clarence O. Durham, an Assistant Professor of Geology at Louisiana State University, and Mr. Frank Welder, a graduate student of Geology at Louisiana State University, taken before the Special Master which reveals with remarkable clarity the fallacy of the premise upon which the erroneous position and theory of Louisiana is based. Mr. Durham and Mr. Welder testified that they were employed by the Attorney General of Louisiana to make a study of the areas involved in this case to determine the geological history of the areas with no purpose of establishing the boundary between the states, and they made no boundary study of the areas; that they were unable to locate and establish the thalweg, or the middle of the main navigable channel of the Mississippi River in the old abandoned channels of the Mississippi River after the natural and artificial avulsions; that their whole development of this matter has been based upon ignoring the term "*thalweg*" as having any relation whatsoever to navigation.

"*By Mr. McKamy:*

"Q. Mr. Durham, will you tell us your definition of *thalweg*.

"A. Thalweg, sir, is the deep portion or zone of a stream. My understanding is that it's derived from the German word *valleyway*, and any stream, therefore, would have a thalweg by that definition.

"Q. You do not refer it in any way to navigation?

"A. No sir.

"*By Mr. Brandon:*

"Q. And so I understand that your whole development of this matter has been based upon ignoring the term *thalweg* as having any relation whatsoever to navigation?

"A. That is right sir. . . ."

(Transcript, Vol. III, p. 1230.)

"*By Mr. Brandon:*

" . . .

"Q. Mr. Welder, what is your understanding of the term 'Thalweg'?

"A. Having studied a little bit of German, sir, I used the translation 'Valleyway'.

"Q. You do not know its definition then in matters pertaining to navigation or boundaries when it is referred to in reference to the application of the thalweg doctrine?

"A. Sir, I have never done any research toward boundary determination, nor have I ever been affiliated with any navigation on the river, so I am afraid I wouldn't be familiar with the thalweg doctrine.

(Transcript, Vol. III, pp. 1366, 1367)

" . . .

"Q. You did not concern yourself with the location of that thalweg as it existed as of the approximate

date of January, 1933 or shortly thereafter, in attempting to locate anything concerning boundaries or the fixation of the navigable channel prior to the effective making of the cut-off?

"A. Well, sir, on the thalweg, in my mind it is a rather wide and definite zone and I don't feel that it can be pinpointed and so I didn't concern myself too much with it."

(Transcript, Vol. III, pp. 1368, 1369.)

The Effect of an Avulsion

An avulsion "works no change of boundary which remains in the middle of the old channel although no water may be flowing in it, and irrespective of subsequent changes in the new channel".

The New Channel Thenceforth Belongs Wholly to the State Whose Soil It Occupies

It should be borne in mind that upon the occurrence of the avulsion (circa 1864-1866) across Diamond Point Bar, making a chute cut-off across the same and separating the towhead from the remainder of Diamond Point, the new channel in its entirety from the point of division of the thalweg of the river at the time of the avulsion to the point where the waters flowing through the new channel emptied back into the course of the river downstream was wholly within the territory of the State of Mississippi. When the main flow of the river adopted this new channel, the entire breadth of this new channel for its entire length and on either side of the thalweg of the new (chute cut-off) channel was within Mississippi and constituted a part of the territory of the State of Mississippi.

" . . . if, by any natural accident, the water, which separated the two states, enters of a sudden into the

territory of the other, it will thenceforth belong to the State whose soil it occupies, and the land, including the abandoned river-channel or bed, will incur no change of master . . .

" . . . When the river changes its course, throwing itself on one of two conterminous states, it then comes to belong to the State through whose territory it runs, all community of right in it so far ceasing."

Nebraska v. *Iowa*, 143 U.S. 359, 12 S. Ct. 396, 36 L. Ed. 186, 188, 189.

And further:

"The gradual and natural deposition of alluvion by the process of accretion is to be distinguished from avulsion which is the sudden and rapid change of the channel of a stream, and if instead of a gradual and progressive change of its bed, the river by accident merely natural, turns entirely out of its course and runs into one of the two neighboring states, the bed which it has abandoned becomes thenceforth their boundary, and remains the property of the former owner (or owners) of the river, the river itself is, as it were, annihilated in all that part *while it is reproduced in its new bed and there belongs only to the state in which it flows.*'"

Idem. (Emphasis supplied.)

Along What Line in the Old Channel (Abandoned as a Result of an Avulsion) Does the Boundary Between the States Remain Unaffected by the Avulsion?

This Court has repeatedly held that "if the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one, by the process known as an avulsion, the resulting change of channel works no change in

the boundary, *which remains in the middle of the old channel*", and has defined the term "middle of the old channel" as being the *thalweg*, or line of navigation of vessels coursing downstream, of the main or navigable channel of the river.

New Orleans v. *United States*, 10 Peters 662, 717, 9 L. Ed. 573, 594;

Jefferis v. *East Omaha Land Co.*, 134 U. S. 178, 189, 33 L. Ed. 872, 876, 10 S. Ct. 518;

Nebraska v. *Iowa*, 143 U. S. 359, 361, 367, 370, 36 L. Ed. 186, 187, 189, 190, 12 S. Ct. 396;

Missouri v. *Nebraska*, 196 U. S. 23, 34-36, 49 L. Ed. 372, 374-376, 25 S. Ct. 155.

In *Nebraska* v. *Iowa* (supra) it was stated that "avulsion would establish a fixed boundary, to-wit: the center of the abandoned channel"; or, as it was further expressed in the same opinion, "the boundary was not changed *and it remained as it was prior to the avulsion, the center line of the old channel.*"

In *Missouri* v. *Nebraska* (supra) this Court said that the boundary line "*must be taken to be the middle of the channel of the river as it was prior to the avulsion.*".

The above statements and quotations are cited and quoted with approval by this Court in the case of *Arkansas* v. *Tennessee*, 246 U.S. 158, 38 S. Ct. 301, 62 L. Ed. 638, which here, in its exceptions, the State of Louisiana contends that the Special Master, in his report, "disregards," though citing and quoting therefrom in his Conclusion of Law No. 5. So let us next consider what this Court held in *Arkansas* v. *Tennessee*, 246 U. S. 158 (supra). In that case, after making the pronouncement hereinabove by us quoted and itself quoting as above from *Nebraska* v. *Iowa*, 143

U. S. 359 (supra) and *Missouri* v. *Nebraska*, 196 U. S. 23 (supra), this Court proceeded to say:

> ". . . if the stream leaves its former bed and establishes a new one as the result of an avulsion, the boundary remains in the middle of the former channel. An avulsion has this effect, whether it results in the drying up of the old channel or not."

What effect is it that this Court has said an avulsion has? It has said that an avulsion has the effect of leaving "the boundary . . . in the middle of the former channel."

This Court having previously stated "it is settled beyond the possibility of dispute that where running streams are the boundaries between states, the same rule applies as between private proprietors; namely that when the bed and channel are changed by the natural and gradual processes known as erosion and accretion, the boundary follows the varying courses of the stream;" proceeded next to say:

> "So long as that channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; but when the water becomes stagnant, the effect of these processes is at an end; the boundary then becomes fixed in the middle of the channel as we have defined it, *and the gradual filling up of the bed that ensues is not to be treated as an accretion to the shores, but as an ultimate effect of the avulsion.* The emergence of the land, however, may or may not follow, *and it ought not in reason to have any controlling effect upon the location of the boundary line in the old channel.*" (Emphasis supplied.)

Arkansas v. *Tennessee*, 246 U. S. 158, 173, 175, 38 S. Ct. 301, 62 L. Ed. 638, 647, 648.

Nothing could be clearer than the rule thus announced, but, if there be doubt, same is certainly clarified by that next stated by the Court in the same opinion:

"How the land that emerges on either side of an interstate boundary stream shall be disposed of as between public and private ownership is a matter to be determined according to the law of each state, under the familiar doctrine that it is for the states to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them. (Cases cited.) Thus, Arkansas may limit riparian ownership by the ordinary high-water mark (cases cited); and Tennessee, while extending riparian ownership upon navigable streams to ordinary low-water mark, and reserving as public the lands constituting the bed below that mark (cases cited), may, in the case of an avulsion followed by a drying up of the old channel of the river, recognize the right of former riparian owners to be restored to that which they have lost through gradual erosions in times preceding the avulsion, as she has done in State v. Muncie Pulp Co. 119 Tenn. 47, 104 S. W. 437. *But these dispositions are in each case limited by the interstate boundary, and cannot be permitted to press back the boundary line from where otherwise it should be located.*

". . .

"Upon the whole case we conclude that the questions submitted for our determination are to be answered as follows:

"(1) The true boundary line between the states, aside from the question of the avulsion of 1876, is the middle of the main channel of navigation as it existed at the Treaty of Peace concluded between the United

States and Great Britain in 1783 (8 Stat. at L. 80), subject to such changes as have occurred since that time through natural and gradual processes.

"(2) By the avulsion of 1876 the boundary line between the states was unaffected, and remained in the middle of the former main channel of navigation, as above defined.

"(3) The boundary line should now be located according to the middle of that channel *as it was at the time the current ceased to flow therein as a result of the avulsion of 1876.*

"(4) A commission consisting of three competent persons, to be named by the court upon the suggestion of counsel, will be appointed to run, locate, and designate the boundary line between the states at the place in question in accordance with the above principles."

(Emphasis supplied.)

Arkansas v. *Tennessee*, 246 U. S. 158, 38 S. Ct. 301, 62 L. Ed. 638, 648-649.

The report of the Special Master in the case at bar and the recommended decree locating the boundaries between the States of Mississippi and Louisiana in the abandoned channels that are the subject of this litigation exactly accords with the foregoing decision.

It is interesting to note that the three commissioners appointed by the Court in *Arkansas* v. *Tennessee* (supra) to ascertain, locate, fix and establish the main channel of the Mississippi River as it had existed immediately prior to the avulsion of 1876 and to take such other evidence as was necessary to fix the line between the States of Arkansas and Tennessee relied to a very considerable extent, as did the Special Master in the case at bar, upon the reconnaissance, reports and chart of Major Charles R. Suter, Corps of

Engineers, United States Army, in the year 1874, and that thereafter the State of Tennessee excepted to the report of the commissioners, insisting that the middle of the main navigable channel as it existed before the avulsion could not be located with reasonable certainty and that the commissioners should have so reported. This Court overruled the exceptions of the State of Tennessee as being "without merit" and confirmed the report of the commissioners locating the boundary, with such certainty as they were then able to do that was reasonable as a practical matter, having regard to the circumstances, in and along the line of the navigable channel of the river as it had existed when the current ceased to flow therethrough as a result of the avulsion.

Because of the pertinency of that said by this Court in overruling the exceptions of the State of Tennessee, we now quote from the opinion, viz:

> "*Defendant insists that the middle of the main navigable channel as it existed before the avulsion could not be located with reasonable certainty and that the commissioners should have so reported.* It maintains that the recommended boundary, . . . *is based entirely on a reconnoissance made by Major Charles R. Suter, Corps of Engineers, United States Army, in 1874*, and insists that the Suter line is not established by the evidence. . . . .
>
> ". . . *The reconnoissance of 1874 was made pursuant to an Act of Congress approved June 23, 1874; chap. 457, 18 Stat. at L. 237, 242, providing for surveys and estimates for the improvement of certain transportation routes to the seaboard.* Major Suter was assigned to make examination of the Mississippi River from Cairo to the Gulf. His party had a government steamboat and, in the performance of the work, passed over,

the part of the river here involved four times. The courses of the channel were taken by compass. Distances were determined by the speed of the boat. Widths of the river were estimated, and to some extent these estimates were checked by triangulation. *The purpose was to ascertain the appearance of the river and to get a general idea of the shape and location of the channel.* No survey by actual measurements was made, and accuracy was not attained. From the evidence and a stipulation of the parties, the commissioners found that there had been no material change in the river between the time of the reconnoissance in 1874 and the avulsion in 1876. *While not made according to actual measurements, the Suter map may be said to present the general situation as it existed immediately before the* avulsion. . . .

"Counsel for the defendant asserts that, 'a map, to be of any value for the purpose of locating any particular lines or objects thereon, must be based upon a survey accurately made by measurement and instrumental observations, and must be a faithful and correct delineation of a faithful survey, in every detail.' And on that basis, he argues that the Suter map is valueless as a means accurately to fix the old channel, because not properly tied to some point or monument. But the standard demanded is not applicable. *The thing to be done must be regarded. It is to locate the boundary along that portion of the bed of the river that was left dry as a result of the avulsion, according to the middle of the main navigable channel at the time the current ceased to flow therein as a result of the avulsion.* Absolute accuracy is not attainable. *A degree of certainty that is reasonable as a practical matter, having regard to the circumstances, is all that is required.* The

line of the greatest depth of water is not necessarily the middle of the channel. (Cases cited.) The location, limits and width of the main navigable channel were not precisely defined or permanent. The determination of its location involved more than mere measurements and required the exercise of judgment based on experience. The degree of accuracy insisted on is not reasonable or practicable.

"Defendant's principal reliance is on opinions expressed by some of the witnesses to the effect that the line cannot be located with reasonable certainty. But such opinions are of little weight as against the facts shown and the determination of the commission. *In addition to the commissioners' careful investigation in the field, there was the testimony of steamboat men and others who were familiar with the situation* as it existed before the avulsion in 1876. It is sufficient to say that *when taken in connection with the Suter map and considered in the light of established physical facts and other evidence*, the testimony of these witnesses clearly establishes the line reported by the Commissioners. The exceptions are without merit and are overruled. The report of the commissioners is confirmed." (Emphasis supplied.)

Arkansas v. *Tennessee*, 269 U.S. 152, 154-157, 46 S. Ct. 31, 70 L. Ed. 206, 207, 208.

So we see that this Court in the case of *Arkansas* v. *Tennessee* (supra), adhered to its previously adopted rule, as expressed in earlier decisions, that "if the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one, by the process known as an avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel, . . . and irrespective of subsequent changes in the new channel."

It is submitted that the contentions of Louisiana have been settled in previous litigation between Louisiana and Mississippi.

In *Louisiana* v. *Mississippi* (1931), 282 U.S. 458, 51 S. Ct. 197, the facts are parallel to the case at issue. There the point bar built eastwardly from the Louisiana shore five or six miles, and in 1912-13 the River cut across the neck or base of this point bar creating an island. In due time the old channel around the long bend filled. The Master found:

> "That the present true boundary line is the middle of the navigable channel prior to the avulsion of 1912-13, *as that channel was when the current ceased to flow therein by reason of the formation of the new channel by the avulsion of 1912-13 and the filling of the former channel.*"
>
> Id., p. 199.

This language seems clear enough. We find the Supreme Court approved the Master's report and by decree adjudged:

> "This cause coming on for hearing by this Court upon the report of Thomas G Haight, Special Master appointed by this Court, and . . . this Court having rendered an opinion sustaining all the findings and recommendations of the Special Master, and directing that a Decree should be entered as recommended by the Special Master, and the Court being fully advised in the premises:
>
> "It is therefore, considered, and now ordered, adjudged, and decreed by this Court as follows, to-wit:
>
> . . ."
>
> "That immediately prior to the avulsion of 1912-13 the boundary line between the State of Louisiana and

the State of Mississippi between latitude 32° 39′ on the North and the division line between Issaquena and Warren Counties, Miss. (as extended Westward), on the South was at the place and line which was the thread of the main channel of the Mississippi River as it then ran; *and that the current having since ceased to flow in part of said channel as it existed prior to said avulsion, because of the new channel produced thereby, at this time the true boundary line* between the State of Louisiana and the State of Mississippi, in that part and so much of the above area as was affected by the avulsion (between said North and South points), *is the middle of the navigable channel of the Mississippi River as said channel was located at the time when the current ceased to flow therein because of the new channel produced by the avulsion of 1912-13.* . . .

Id., p. 370.

The primary ground for Louisiana's exceptions to the Master's report in the case at bar is based on a clause in one sentence taken out of the sentence and out of the context of the whole opinion of this Court in *Arkansas* v. *Tennessee*, 246 U. S. 158. In one sentence in that case this Court said:

> "So long as that channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; but when the water becomes stagnant, the effect of these processes is at an end; the boundary becomes fixed in the middle of the channel as we have defined it, and the gradual filling up of the bed that ensues is not to be treated as an accretion to the shores, but as an ultimate effect of the avulsion."

Louisiana lifts the first clause of this sentence out of the whole and stands it by itself as a criterion for determining a state boundary after the occurrence of an avulsion.

This Court says nothing different in *Arkansas* v. *Tennessee* (supra) from what it has said in other cases. The statement so oft quoted out of context in Louisiana's brief is to be considered according to its bearing on the facts in that case.

Louisiana says the Master "cited but disregarded" this case of *Arkansas* v. *Tennessee*. If an avulsion effected no change in boundary; if the boundary remained where it was prior to the cut-off; then the boundary was in the *thalweg* of the old channel.

The middle of the channel as this Court has defined it is "the sailing lane," "the channel of commerce," "the course of navigation," "the space within which boats can and usually do pass," "nature's pathway," "the navigable part of the river," the "highway for vessels," "the track taken by boats in their course down the stream which is that of the strongest current," the "track of navigation." These several descriptive phrases each express the same thought.

When the line of the thalweg in the old channel closed and failed to qualify within the definitions stated above, it ceased to be a *thalweg* and the line thereof became fixed, because if the old channel could not qualify under the above description at low water, it was not a running stream.

Further, if the old channel could not support commerce of the river at low stage, then clearly it was not a part of the permanent river.

The language of Mr. Chief Justice Marshall is apt:

> "Whenever the river is a boundary between states, it is the main, the permanent river which constitutes

that boundary; and the mind will find itself embarrassed with unsurmountable difficulty in attempting to draw any other line than the low water mark."

Handley's Lessee v. *Anthony, et al.*, 5 Wheat. U.S. 374; 5 L. Ed. 113.

In Louisiana's brief on the boundary in Oak Bend it is stated: "The legal question involved here is identical with the one involved in fixing the boundary around Diamond Island." (La. Brief, p. 26.)

Further Louisiana states: "This Oak Bend channel was in 1939, and *yet remains a running stream*, which is changed each year by erosion and accretion." (La. Brief, p. 28.) Because at a stage of seventeen feet or above on the Vicksburg gauge water flows through the old Oak Bend area. (Emphasis supplied.)

The area of Oak Bend asserted by Louisiana to yet remain a running stream is described by the Master after an on-the-site visit:

"In 1939 and again in 1940 no water flowed through the Oak Bend channel at low water and the entire low water flow was through the cutoff.

"At times of high water there was a flow of water in Oak Bend and may be at this time. When I visited the Oak Bend region in July, 1954, the bank was some 20 feet above the water in the river. There was a large expanse of sand in the old channel containing some vegetation. There was no water, except in certain low places where there was some stagnant water.

"At that time the river going through the cutoff was deep, the current swift, and large boats carrying commerce were moving on the river.

". . . current ceased to flow in the Oak Bend channel by at least 1940. Navigation could not use the

channel at that time, the water was stagnant in the old channel except in times of high water. It was no longer a part of the main river which continued to flow at all stages with a swift current through the cutoff carrying the commerce of the river."
(Master's Report, pp. 49, 50.)

It seems clear that in this case the Master has well read, understood and followed the reasoning of this Court in *Arkansas* v. *Tennessee*, 246 U. S. 158, where this Court said:

"Upon the whole case we conclude . . .:

"(1) . . .

"(2) By the avulsion of 1876 the boundary line between the states was unaffected, and *remained in the middle of the former main channel of navigation, as above defined.*

"(3) The boundary line should now be located according to the middle of that channel *as it was at the time the current ceased to flow therein as a result of the avulsion of 1876.*"

(Emphasis supplied.)

What the Master saw upon his visit to the Oak Bend area and has reported is demonstrative of that which occurred when Diamond Island Towhead was separated from Diamond Point Bar by the avulsion (circa 1864-1866), and the boundaries should now be located according to the middle of the abandoned channels as they were at the times the current ceased to flow therein.

Most surely the Master's finding accords with *Iowa* v. *Illinois*, again approved by this Court in *Arkansas* v. *Tennessee*, that the boundary is fixed in "the main, the

permanent river . . . and not that part which flows in seasons of high water, and is dry at other times."

The Doctrine of Accretions Has No Application to the Incidence of an Avulsion

In the case of *Tennessee* v. *Muncie Pulp Co.*, 119 Tenn. 47, which involved the same old abandoned channels as were involved in the case of *Arkansas* v. *Tennessee*, 246 U.S. 158, 38 S. Ct. 301, 62 L. Ed. 638 and 269 U.S. 152, 46 S. Ct. 31, 70 L. Ed. 206, it was stated:

> "The doctrine of accretions has no application to the filling up of the old channel, abandoned by the river for a new one, as the result of an avulsion. The rights of the parties, in every respect, remain as they existed prior to the change. The proof conclusively shows that this change was sudden, violent and complete; that it resulted in drawing off much of the waters of the old channel, and leaving those remaining still and stagnant, a mere lagoon; that it was no longer used by boats navigating the river, except occasionally by small craft when the waters were up; that the channel immediately began to fill with sand and other alluvial deposits; and snags, bars, and banks appeared in a short time above the surface, and willows and cottonwoods began to grow upon them . . ."
>
> Id., pp. 122-123.

In *Missouri* v. *Nebraska*, 196 U.S. 23, 157, 25 S. Ct. 155, 49 L. Ed. 372, this Court said:

> "Accretions, no matter to which side it adds ground, leaves the boundary still the center of the channel. Avulsion has no effect on the boundary, but leaves it in the center of the old channel."

At the time of the occurrence of the avulsion which separated Diamond Island Towhead from Diamond Island Point the respective states of Mississippi and Louisiana had title to and sovereignty over the islands (including the submerged areas) on either side of the thalweg in the former main navigable channel of the Mississippi River around Diamond Island Towhead. Louisiana had title to and right of sovereignty over the land (including that submerged) on the right side of the line of the thalweg. Mississippi had title to and right of sovereignty over the land (including that submerged) on the left side of the thalweg; and this title and sovereignty of Mississippi included and extended over the entire area occupied by the newly adopted avulsive channel, to the full breadth, length and extent thereof.

United States v. *Oregon*, 295 U.S. 1, 55 S. Ct. 610, 79 L. Ed. 1267;

United States v. *Utah*, 283 U.S. 64, 51 S. Ct. 438, 75 L. Ed. 844;

Oklahoma v. *Texas*, 258 U.S. 574, 42 S. Ct. 406, 66 L. Ed. 771;

Kansas v. *Colorado*, 206 U.S. 46, 27 S. Ct. 655, 51 L. Ed. 956;

Trustees of Hopkins Academy v. *Dickinson*, 9 Cush. (Mass.) 544;

Handley's Lessee v. *Anthony, et al.*, 5 Wheat. 374, 5 L. Ed. 113.

As has been pointed out by the Special Master in his report (pp. 11, 12), this Court in the case of *State of Iowa* v. *State of Illinois*, 147 U.S. 1, 37 L. Ed. 55, held that the boundary between states is fixed by the rule of the thalweg and quoted with approval from the case of *Buttenuth* v. *St.*

Louis Bridge Co., 123 Ill. 535, 17 N.W. 439, where it is said:

> "The law as stated by law writers, and in the adjudged cases, seems to be that where a river is declared to be the boundary between states, although it may change imperceptibly from natural causes, the river 'as it runs continues to be the boundary'. But if the River should suddenly change its course, or desert the original channel, the rule of law is, the boundary remains in the middle of the deserted river bed. Where a river is the boundary between states, as is the Mississippi between Illinois and Missouri, it is the main, the permanent, river which constitutes the boundary, and not that part which flows in seasons of high water, and is dry at other times. Handly's Lessee v. Anthony, 5 Wheaton 374. In no other way would a river be a permanent fixed boundary, at all times readily ascertainable. There are many cogent reasons why the boundary lines between states should be permanent. Otherwise, territory in one state at one time, sooner or later, might be in another state. It must be in one state all the time, or else the state would lose jurisdiction over it."

It logically follows as a matter of necessity that after the occurrence of an avulsion, when the river has taken its new channel and the old channel has been filled as a result thereof to the extent that the current no longer flows therein and it is no longer a navigable stream, the boundary fixed by the occurrence of the avulsion cannot be said to be thereafter altered by subsequent depositions of sediment in high stages of the river and subsequent filling of the old channel nor by subsequent surface scouring resulting from the flow or overflow at high or flood stages.

"And the gradual filling up of the bed that ensues is not to be treated as an accretion to the shore but as an ultimate effect of the avulsion.

". . .

". . . These depositions are in each case limited by the interstate boundary and cannot be permitted to press back the boundary line from where otherwise it should be located."

Arkansas v. *Tennessee*, 246 U. S. 158 (supra).

Southern Boundary of Diamond Point

The Master stated the following conclusions of law to which no exceptions have been made:

"2. The tha weg is defined as meaning the middle of the main navigable channel, the track taken by boats in their course down the stream, which is that of the strongest current." (Report, p. 6.)

"7. Where an island is formed in a navigable stream which is the boundary between states, the island belongs to the state situated on the side of the thalweg on which the island is formed." (Report, p. 8.)

Conclusion of Law No. 7 has relation to the island formed in the navigable channel of the Mississippi River off the South side of Diamond Point in the Kellogg Lake area. The Special Master has found factually that this island was formed and first appeared on the Mississippi side or North side of the thalweg of the Mississippi River and thereafter by the deposition of alluvion and accretion has become attached thereto. Louisiana takes no exception to this special finding of fact. The facts relative thereto support the findings of the Special Master.

Keeping in mind that Louisiana offered evidence through its main witness, Mr. C. O. Durham, and its other principal

witness, Mr. Welder, (see testimony quoted in this brief from Transcript, Vol. III, pp. 1236 and 1367) that they had no real comprehension of the meaning of the term *thalweg* and that their whole development of their testimony upon the issues involved was based upon ignoring the term *thalweg* as having any relation whatsoever to navigation, the main witness for Louisiana states to the Special Master these facts as to the island formed on the southern side of Diamond Point:

"Mr. McKamy: *The main thalweg is south of that island in 1926, isn't it?*

"The Witness: *I would say that the deepest thalweg is south and within the next two years this becomes the only thalweg.*

"Mr. Clifton: I think your Honor is entitled to an answer to your question—was the main thalweg south. I would like to ask the witness if he can understand that question and answer it.

"A. The thalwegs are approximately equal but I would say the main flow and consequently the main thalweg at the time of this map is south of the sand bar.

"Mr. McKamy: And becoms the sole thalweg?

"The Witness: Eventually.

"Mr. McKamy: Have you got a 1933 map here that shows the situation?

"The Witness: Yes, sir, we have it. I can show you very plainly on the 1932 photographs. They may even be plainer at that time, to show you the abandonment.

"Mr. McKamy: By 1929, it shifted way down here?

"The Witness: Yes, sir, by 1929, shifted into this area.

"Mr. McKamy: Still further south—shows the thalweg to be cutting on this side, the right bank?

"The Witness: Yes, sir, cutting south of that island and by 1932, sir, as demonstrated on these photographs, which are 'Louisiana Exhibit No. 23,' the area of the sand bar that has been discussed I will marke in 'A'. By this time, during mean low water, there is no flow around the north.

"Mr. McKamy: In other words, became attached to the left bank?

"The Witness: Yes, sir, by its abandonment of that channel to the north, is now completely to the south. The retreat of the bank to the south has been previously alluded to as occurring between 1926 and 1929 and is still continuing, as can be seen by the caving bank along here, from the point between 'B' in blue to 'C' in blue, so that the channel that previously existed north of the sand bar has, by the time of the photographs, 'Louisiana Exhibit No. 23,'' been completely abandoned in high water.

"Mr. McKamy: The only maps that you have show that this island, the first time it appears on a map shows it north of the main thalweg?

"The Witness: Yes, sir, on the 1925-26 map."

(Transcript, Vol. III, pp. 1099-1100. Emphasis supplied.)

Dr. H. N. Fisk, a well qualified geologist (Master's Report, p. 20), testified before the Master as to this sandbar formation which formed north of the thalweg and on the Mississippi side of the river during cross-examination by Louisiana:

"Q. Have you made a study of the formation of that island, sir?

"A. Yes, sir, at some past I have made a study of this island. . . ."

And then explaining, Dr. Fisk said:

". . . One of the final stages in the deterioration of the channel, which subsequntly became abandoned, an island formed in the river and the thalweg in the river, in my opinion, at that time was on the south side of that island. . . . .

"Q. You mean, Doctor, that the island formed to the north of the thalweg in the river?

"A. Yes, sir, the main flow was to the south, as most islands are,"

(Transcript, Vol. I, pp. 329-331.)

Mississippi also offered Mr. Austin B. Smith, a man of twenty-five years experience in work on and studies of the Mississippi River (Master's Report p. 24). Mr. Smith locates the South Boundary of Diamond Point on a map of the Mississippi River Commission (Smith Exhibit 5, Transcript 679) as in the thalweg of the river which lies south of this island area claimed by Louisiana.

All of the witnesses in the hearing of this cause testified in person before the Master. At most, the exception of Louisiana on the point under consideration questions the Master's finding on what Louisiana says are disputed questions. The record does not support this contention.

However, the burden of sustaining the exceptions is on Louisiana as the objecting party; and the Master has had the opportunity of hearing and examining the witnesses face-to-face; and there is certainly a fair, a substantial amount of evidence to support the Master's findings; and the Master's findings are not shown to be erroneous by any persuasive weight of the evidence—so the Master's finding should not be disturbed.

On all the testimony heard and seen by the Master he found:

"Mr. Durham's testimony shows that from the only available maps and hydrographic surveys the island is shown to be north of the main thalweg of the river.

"Dr. H. N. Fisk testified that he made a detailed study of this area and that in his opinion the island was formed north of the thalweg of the river.

"This being the only evidence concerning the formation and location of the island and all of the maps and charts showing the island to lie north of the thalweg of the river and on the Mississippi side of the river, I find that the island is located within the territory of Mississippi and that the boundary between the states should be drawn south of the island at the location of the thalweg when the current ceased to flow in this channel and the water became stagnant as a result of the abandonment of the channel by the river.

(Master's Report, pp. 48-49.)

Fallacy of Arguments Made By Louisiana

The fallacy of the contentions made by Louisiana during the hearing before the Special Master and now is attributable to the following:

(a) The admitted ignorance on the part of the witnesses for the State of Louisiana of the rule of the thalweg and the law applicable in instances of an avulsion.

(b) The obvious attempt on the part of the State of Louisiana to evade the effect of the rule of the thalweg and the settled law applicable in boundary questions in instances of an avulsion.

(c) A misinterpretation by counsel for the State of Louisiana of the language of this Court in the numerous decisions that have been rendered in litigation of this character.

(d) The attempt on the part of the State of Louisiana

to develop some "new theory of closing channels" evolved by a graduate student of the University of Louisiana while engaged in preparation of his thesis for his Doctor's degree.

(e) The total lack of knowledge and experience with the action of the Mississippi River in the vicinity of the Diamond Island area.

(f) A misconception of the doctrine of accretion and the extent to which the same may be applied as pertains to boundaries and of the rule of law that such is not applicable in instances of avulsion with reference to the closing of old abandoned channels.

(g) The erroneous concept that the boundary between two sovereign states, whose boundaries are a navigable stream, may be altered or affected by deposition and filling in and of a former abandoned boundary channel or by surface scouring in times of high water after an avulsion.

(h) An apparent unwillingness to accept the fact that no evidence whatsoever was offered by the State of Louisiana based on the rule of thalweg announced by this Court that was pertinent to solution of the problem involved in this litigation under the well established rules of law here applicable.

(i) An unwillingness to accept the facts in the case as established by (1) credible and competent lay witnesses, (2) the testimony of credible and competent experts in the fields of geology and engineering, as offered by the State of Mississippi, (3) as demonstrated by the numerous maps and charts offered in evidence by the State of Mississippi, and (4) as found to be by the Special Master himself in conducting a personal examination and investigation of the critical areas in dispute.

(j) The assertion of a new theory which has no legal nor factual basis, and which is predicated upon a misconception of the Master's findings and conclusions.

(k) The erroneous assertion that the Master adopts a different legal test from that which he set out in Conclusion No. 5 of his report.

That the meaning of the term "thalweg," and "the rule of thalweg" were unknown to or not applied by the three, and only three, witnesses for the State of Louisiana is best demonstrated by quotations from their testimony in the record.

We have already quoted portions of the pertinent testimony of Louisiana's witnesses Durham and Wolfer (Tr., Vol. III, pp. 1236, 1366, 1369) (This brief pp. 13-15, 32-33), which conclusively illustrates this.

The only other witness offered by the State of Louisiana was Mr. H. M. Hayne, an engineer employed by the Department of Public Works of the State of Louisiana, who testified that he had made no study of the particular problem involved in this litigation but had merely prepared certain charts and drawings (La. Exhibit No. 43, Tr., Vol. III, p. 1398) overlaying bank lines from River Commission charts and maps, following directions of counsel for the State of Louisiana for the preparation of Louisiana's Exhibit No. 43. That the Louisiana Exhibit No. 43 is utterly valueless as an aid to the Court in resolving the questions involved in this litigation is demonstrated by the cross-examination of the witness H. M. Hayne (Tr., Vol. III, p. 1399, *et seq.*) whereby it was shown that the same was prepared with utter disregard of the rule of thalweg, the applicable law in instances of avulsion, and lack of familiarity with the law of accretion. It is obvious that these charts were prepared in line with the theory of the State of Louisiana throughout this case that the question of

boundary between the states is to be resolved upon some theory of bank line placement, high water overflow scouring effects, and tailing out of bar formations or low water bank line features.

Mr. H. M. Hayne on cross-examination stated:

"*By Mr. Brandon:*

". . .

"Q. You did not attempt to reconstruct or depict on any of the charts or exhibits prepared by you, the channel of the Mississippi River as it existed prior to the chute cutoff that separated Diamond Island Towhead from Diamond Point?

"A. No, sir."

(Tr., Vol. III, p. 1399)

". . .

"Q. The point I want to make is that you did not on any of your charts, show either the thalweg of the Mississippi River as of any particular date, or deep water navigable channel of the Mississippi River as of any of those dates.

"A. No, sir."

(Tr., Vol. III, p. 1402)

". . .

"Q. Turn now to your Plate No. 2.

"A. Yes, sir.

"Q. The green line that lies to the east of the red or orange cross-hatched area is nothing more than that line which was surveyed and mapped by engineers for the Department of Public Works of the State of Louisiana, following a course which had been marked out for such survey by Mr. Welder, is that right, sir?

"A. That's right.

"Q. Who is one of the geologists testifying for Louisiana?

"A. That's right.

"Q. And that represents, as you say, a chute or swale or channel through which water of the Mississippi River can now flow at high water stages only?

"A. That's been testified to."

(Tr., Vol. III, p. 1403)

". . .

"Q. Your Plate No. 2 has been prepared on the theory that the rights of the parties to this litigation are governed by low water bank lines, is that correct?

". . .

"A. I was asked to divide the accretions there and from a point as picked out by the geologist by lines perpendicular to the following bank lines.

"Q. Low water bank lines?

"A. Low water bank lines: *I did not go to the thalweg.*"

(Tr., Vol. III, pp. 1405-6. Emphasis supplied.)

". . .

"Q. You have not attempted to find any point where the thalweg or navigable channel of the Mississippi River, as it existed at the time of the occurrence of the chute cutoff, was separated from that channel that was adopted in the chute itself as a result of the cutoff, have you? In other words, you made no effort to find what we have referred to in this case as points of divergence of those flows of the river?

"A. No, sir, it didn't show on the maps. I have just traced my drawings directly from the maps.

"Q. You then have prepared this in accordance with certain requests and directions communicated to you

by the attorneys for the State of Louisiana, is
right?

"A. Yes, sir.

"Q. And without reference to navigable chann
the river in any instance?

"A. No.

"Q. You made no reference to those?

"A. No reference to navigable channels."

(Tr., Vol. III, pp. 1405-6.)

We submit that these admissions effectively dispos
the witnesses for the State of Louisiana and justify
Master's statement in his report (pp. 32-34).

The whole theory of the case for the State of Louis
as developed by the three witnesses for that state is p
cated upon an attempt to fix the boundary between
states along some "tight meander belt" following the
of drains and scoured-out surface features caused by
flow of water at high stages of the river and by the dep
tion of sediment from the slack overflow water at such
stages; upon the theory that the doctrine of accretio
applicable to the process of filling an abandoned river c
nel after the completion of an avulsion when the main
rent of the river is coursing down and through the n
made avulsive channel; and upon the theory that by
occurs in the new channel after the completion of the a
sion the state boundary can be pressed back under the
trine of accretion, which theory is repudiated by this C
in *Arkansas v. Tennessee*, 246 U.S. 158 (*supra*), sta
that, "These dispositions are in each case limited by
interstate boundary and cannot be permitted to press
the boundary line from where otherwise it should be
cated." This last contention is the Louisiana theory o
"tailing bars." If this theory were followed, it would

sult in there being two boundaries in this location resulting from the avulsion, a situation abhorrent in law.

The fact that the State of Louisiana is confused as to the applicable law in presentation of its exceptions to the report of the Master is demonstrated by certain questions propounded in the brief for Louisiana:

> "In what *varying* location of the old channel is the boundary to be fixed in such old channel around Diamond Island, inasmuch as it is not disputed that the island was formed as a result of an avulsive cutoff?"
>
> (Emphasis supplied.)
>
> (La. Brief, p. 2.)
>
> "To which state do accretions belong when they tailed down in front of Diamond Island . . .?"
>
> (La. Brief, p. 3.)

And this rather remarkable question:

> "But suppose that the boundary in the old channel did become fixed when there was no low water flow therein, wouldn't the old channel become a running stream when the waters rose and returned to their former bed, and wouldn't the boundary marked by such running stream 'still be subject to be changed by erosion and accretion'?"
>
> (La. Brief, p. 17.)

And finally this question:

> "*What has navigation to do with a boundary becoming fixed in a channel?*" (Emphasis supplied.)

Thus Louisiana demonstrates her case as presented wholly without regard to the rule of the thalweg and the

law of the avulsion announced and settled by so many decisions of this Court.

The Exceptions of Louisiana Have No Basis Either In Law Or In Fact

Louisiana does not assert that the facts as specially found by the Special Master (Master's Report, pp. 13-42 and 46-50) and stated in the summary of the report (Master's Report, pp. 42-45 and 51) are not abundantly supported by the credible evidence in the case. Louisiana simply seeks to substitute language and statements of its own choosing as being the facts in this case which are unsupported by the evidence and contrary to the applicable law. (Rules of this Court, *supra.*)

By its exceptions to the Master's report, in effect, Louisiana seeks to review the entire record in this cause, except (1) the facts admitted by Louisiana (Tr., Vol. 1, 5-6, 8) (Master's Report, pp. 15 and 46); and (2) the Master's finding of fact that the evidence is insufficient to show that either Louisiana or Mississippi had acquired title to the Diamond Island Towhead area by prescription and acquiescence of the other state.

We cannot agree with the statement contained in the brief for Louisiana to the effect, "That it will only be necessary for this Court to consider a very small portion thereof" (sic, the Record), or that this Court could find justification in rejecting the carefully considered findings of fact specially made by the Master without reviewing the testimony of the witnesses and considering the exhibits offered in connection with their testimony.

We most emphatically deny the statement of Louisiana (La. Brief, p. 6): "The almost conclusive facts, in connection with the legal questions, are shown on one particular survey of the Mississippi River Commission," i.e., Exhibit

Louisiana Cross-Examination Fisk No. 4 (Tr., Vol. I, 328-9), a copy of which, with certain matters superimposed thereon, Louisiana has inserted in its brief as Plate No. 1A.

The exhibit Louisiana Cross-Examination Fisk No. 4, as introduced in evidence, indeed has no pertinency whatsoever to the solution of the problem of fixing the boundary between Mississippi and Louisiana in the abandoned channel around Diamond Island Towhead as a result of the avulsion (*circa* 1864-1866).

It is admitted that the Diamond Island Towhead chute cutoff avulsion occurred at some time between the years 1863 and 1866. By the time Major Suter made his report dated February 18, 1875, eight or ten years after the occurrence of the chute cutoff, from his reconnaissance made in this particular area in 1874, the former thalweg channel of the river around Diamond Island Towhead had "filled up and the channel established itself permanently in the chute." (Mississippi Exhibit Smith "A," Tr., Vol. II, p. 660.) Prior to March 16, 1877, navigation had been established through the chute cutoff channel (Tr., Vol. II, p. 661).

By the time of the making of the survey of the Mississippi River by the Mississippi River Commission in 1878-80 (Mississippi River Commission Charts Nos. 49 and 50 (Complainant's Exhibit No. 10, Tr., Vol. I, p. 110, Complainant's Exhibit Smith No. 2, Tr., Vol. II, p. 665)), the old abandoned channel of the Mississippi River had filled to such an extent that no water could overflow into or enter same except after the surface of the river had risen to a stage of from fifteen to twenty feet above the stage of mean low water (Tr., Vol. II, pp. 716-718).

The Mississippi River Commission chart introduced as Exhibit Louisiana Cross-Examination Fisk No. 4 (Tr., Vol. I, pp. 328-9) was compiled from sundry manuscript charts made at varying river stages and in this particular area at

some intermediate high stage of the river, i.e., at a stage of about seventy feet, Memphis datum (Tr., Vol. II, p. 814), and being at a high stage of approximately twenty feet above mean low water (Tr., Vol. II, p. 822). The so-called "channel" depicted on the chart upon which Louisiana seeks to overcome the report of the Master in the case at bar would have had no greater depth than approximately five feet at the high stage of water depicted by the chart, and hence that so-called "channel" would have been completely dry at a river stage of fifteen feet above mean low water.

The so-called "channel" depicted upon the map here relied upon by Louisiana was only one of several flood water depressions, sloughs, drains or scoured out high water surface features and was in no way related to the location of the abandoned thalweg. That depicted by the manuscript chart (Exhibit Louisiana Cross-Examination Fisk No. 4, Tr., Vol. I, pp. 328-9) as reproduced in Louisiana's brief, pages 8-9, and the enlargement (Louisiana Brief, pp. 6-7) is illustrative of a high water surface scouring feature in the abandoned former river bed around Diamond Island Towhead as shown by Complainant's witnesses Fisk and Smith. The features and situation shown on this manuscript chart, to which Louisiana seeks to give emphasis, must not be confused with those which form the basis for locating the boundary between the states after an avulsion. This is clearly demonstrated by the testimony of the witnesses for Mississippi regarding the said manuscript chart. See testimony of Dr. H. N. Fisk (Tr., Vol. I, pp. 319-329) and that of Mr. Austin B. Smith (Tr., Vol. II, pp. 808-822).

Contrary to the assertion of Louisiana at pages 6 and 7 of its brief, the manuscript chart (Exhibit Louisiana Cross-Examination Fisk No. 4, Tr., Vol. I, pp. 328-9) must not be confused with Complainant's Exhibits Nos. 10 and 11 (Tr.,

Vol. I, p. 110) or with Complainant's Exhibit Fisk No. 5 (Tr., Vol. I, p. 79), Fisk No. 6 (Tr., Vol. I, p. 143), Smith No. 2 (Tr., Vol. II, p. 665) and Fisk No. 15 (Tr., Vol. III, p. 1457); nor should same be confused with Louisiana Exhibits Cross-Examination Fisk No. 1 (Tr., Vol. II, p. 840) and No. 16 (Tr., Vol. III, p. 1002). They are not the same, as a comparison will conclusively show.

That the depression or swale which was surveyed by Louisiana's engineers (Louisiana Exhibit No. 36, Tr., Vol. III, p. 1325), and which by its Exceptions Nos. 3, 4, 5 and 9(B) Louisiana seeks to have this Court establish as a part of the boundary of the States of Mississippi and Louisiana, is nothing more than one of several high water scour features (observed by the Special Master in course of his inspection of the Diamond Island Towhead area) is clearly demonstrated by exhibits introduced in evidence and testimony of witnesses, including the following: "Geological Investigation of Diamond Island Towhead Area" Report by Dr. H. N. Fisk with Appendix, Plates 1-11 (Tr., Vol. I, p. 45); Testimony of Dr. H. N. Fisk (Tr., Vol. I, pp. 34, 44, 59, 73-77, 88-94, 148-163, 172-182); Report of Mr. Austin B. Smith dated July 14, 1954 to the Attorney General for the State of Mississippi (Tr., Vol. II, p. 747); Testimony of Mr. Smith (Tr., Vol. II, pp. 808-822, 845-851); Testimony of Mr. Clarence O. Durham, Jr. (Tr., Vol. III, pp. 983-984, 1004, 1171-1176, 1260-1262); Testimony of Mr. Welder (Tr., Vol. III, pp. 1305, 1308).

The Special Master accurately and correctly fixed the eastern terminus of the boundary between the states around Diamond Island Towhead at Point "S" as shown on Complainant's Exhibit Smith No. 5 (Tr., Vol. II, p. 679) upon which this Point "S" was placed by Mr. Smith at the request of the Special Master. This action of the Special Master is predicated upon the clear, certain, material, rele-

vant and undisputed proof in the case and is supported by all of the evidence in the case, including: (a) Map No. 20 made by Major Suter from Survey of Year 1874 (Tr., Vol. I, p. 110) and Report of Major Suter dated February 18, 1875, Complainant's Smith Exhibit "A" (Tr., Vol. II, p. 660); (b) "Geological Investigation of Diamond Island Towhead Area" by Dr. Harold N. Fisk, Ph. D. of date August 25, 1944, with Appendix, Plates 1-11 (Complainant's Exhibit Fisk No. 4, Tr., Vol. I, p. 45); (c) Testimony of Dr. H. N. Fisk (Tr., Vol. I, pp. 77-82, 164, 167, 482, 190, 279); (d) Report of Mr. Austin B. Smith dated July 14, 1954 to Attorney General for the State of Mississippi (Complainant's Exhibit Smith No. 9, Tr., Vol. II, p. 747); (e) Testimony of Mr. Austin B. Smith (Tr., Vol. II, pp. 856-868, 873); (f) Complainant's Exhibit Smith No. 10 (Tr., Vol. II, p. 874); (g) Testimony of Captain William H. Reed (Tr., Vol. I, pp. 483-484); (h) Testimony of Louisiana witnesses Durham and Welder relative to the existence of the gravel bar extending between the divided thalwegs (Durham Tr., Vol. II, 901, 948-959, Vol. III, 1142, et seq., 1139, 1256-1258; Welder Tr., Vol. III, 1323-1331, [illegible], 1382).

When the chute cutoff channel across Diamond Island Point had widened and deepened sufficiently to carry a major portion of the current of the river, the old channel around Diamond Island Towhead (from the point in the thalweg from which the current was diverted through the cutoff channel by reason of the avulsion) was rapidly plugged and filled. (See testimony of Dr. H. N. Fisk and Mr. Austin B. Smith above referred to.) The submerged bar formed at the upper end of Diamond Island Towhead between the divided currents was never eroded and *is yet in evidence* (Master's Report, p. 44). The process of closing, filling and plugging of the old thalweg channel around Diamond Island Towhead was much more rapid than that of

Oak Bend following the construction of the Diamond Point Cut-Off by U.S. Engineers in 1933 (the result and effect of which was personally seen by the Master). This fact is established by testimony of Dr. H. N. Fisk (Tr., Vol. I, pp. 94-100, 181-182) and of Mr. Austin B. Smith (Tr., Vol. II, pp. 673-675, Vol. III, pp. 1439-1449). Hence there could have been no "migration" of the point at the head or upper end of the old abandoned channel around Diamond Island Towhead which has been located as Point "S" in the report of the Master as of the time when the current of the river ceased to flow through the old channel and it became abandoned.

The Master's Findings of Fact Are Conclusively Shown to Be Correct

The Special Master has executed his commission in accordance with the order of reference, and with the utmost care. His stated conclusions of law accord with the prior decisions of this Court and have been correctly applied to the facts of this case. During the course of many days consumed in the hearing of this cause, the Master personally heard and observed the expert and lay witnesses testify; he observed their factual demonstrations in utilizing the maps, charts, diagrams and other exhibits to develop the facts; and he personally inspected the critical areas. He has made adequate references to testimony and exhibits to support his factual findings. (Master's Report, pp. 15-42 and 46-50.)

The Master has adequately and sufficiently documented his Special Findings of Fact (Master's Report, pp. 13-51). Here we submit more complete and detailed references to exhibits and testimony which conclusively support and confirm each of the summarized and numbered Findings of Fact set forth at pages 42-45 and 51 of the Master's Report.

To do this we restate the Summary of Findings of Fact as reported by the Master, appending thereto additional references to the exhibits and the testimony, to which the Court may refer, viz.:

Summary of Findings of Fact as to Diamond Island

"1. A point bar (Diamond Island Point Bar) was formed and built by erosion of the territory of Louisiana on the right bank of the Mississippi River and by accretion to the mainland of Warren County, Mississippi, in a northerly and westerly direction, over a long period of years. As the point bar thus moved, the thalweg or main navigable channel of the River, forming the boundary between Louisiana and Mississippi, also moved in a northerly and westerly direction until it reached a position about 1864 around to the north and west of what is now called Diamond Island."

Stipulation of the State of Louisiana (Tr. 5); Map Exhibits to Original Bill of Complaint Nos. 1-7(a) and 7(b) (Tr. 110); Map Exhibits to Original Bill of Complaint Nos. 30-32 (Tr. 110); Fisk Exhibit No. 4 (Tr. 45); Fisk Exhibit No. 11 (Tr. 306); Exhibits to Testimony of J. Proby Sessions, C. E., Nos. 1-4 (Tr. 370, 379, 387, 393); Exhibits to Testimony of Austin B. Smith, Smith Exhibit No. 6 (Tr. 695); Testimony of Dr. Harold N. Fisk (Tr. 15-38, 45, 57-60, 61-66).

"2. Sometime between the year 1864 and the year 1866 the River by an avulsion during a period of high water cut across the point bar and formed a chute cutoff, leaving the northwest end of the point bar an island, thereafter known as Diamond Island, but with the main channel of the River still flowing around the island to the north and west thereof."

Stipulation of the State of Louisiana (Tr. 5); Map

Exhibits to Original Bill of Complaint Nos. 7(a), 7(b) and 8 (Tr. 110); Fisk Exhibit No. 4 (Tr. 45); Fisk Exhibit No. 11 (Tr. 306); Exhibits to Testimony of J. Proby Sessions Nos. 1-4, inc., overlaid (Tr. 370-393); Smith Exhibit No. 10 (Tr. 695); Report of Austin B. Smith to Attorney General of Mississippi, Smith Exhibit No. 9 (Tr. 747); Testimony of Dr. H. N. Fisk (Tr. 44-73).

"3. After the chute cutoff was formed it developed and widened until the major portion of the flow of the River was diverted into it and the former main channel around the island ceased to be navigable and was filled by deposition of gravel, sands, clays, silt and other materials. The current ceased to flow in this channel and the water became stagnant except in periods of high water by at least the period 1878-80."

Map No. 20 made by Major Suter from Reconnaissance of 1874 (Tr. 110); Report of Major Charles R. Suter of date February 18, 1875, Smith Exhibit "A" (Tr. 660); Charts 49 and 50, Mississippi River Commission, Exhibit No. 1 to Bill of Complaint (Tr. 110); "Geological Investigation of Diamond Island Towhead Area" by Harold N. Fisk, Ph. D., dated August 25, 1944 with Appendix Plates Nos. 1-11 (Tr. 45); Testimony of Dr. H. N. Fisk (Tr. 12-100, 129-141, 162-170, 172, 181-182, 207-209, 297); Report of Austin B. Smith dated July 4, 1954 to Attorney General of Mississippi, Smith Exhibit No. 9 (Tr. 747); Photostatic copy Annual Report Chief of Engineers for Year 1878, Part II, Smith Exhibit "B" (Tr. 62); Chart No. 49 of Year 1878-80, Survey of Mississippi River Commission, Smith Exhibit No. 2 (Tr. 665); Graph-Approximate Position of Dead Thalweg *Circa* 1876, Smith Exhibit No. 7 (Tr. 729); Rough sketch, Smith Exhibit No. 10 (Tr. 874);

Testimony of Mr. Austin B. Smith (Tr 643-661, 669, 677-678, 689-720, 754-760, 792, 797-803, 822-831, 845-848, 1436-1456).

"4. The hydrographic survey of the Mississippi River of the date 1882 shows the channel around Diamond Island to be closed and to be filled to an elevation of 15 to 20 feet above mean low water. Charts 49 and 50, Complainant's Exhibit 10; Smith's testimony, Tr. pp. 707-717, and Fisk's testimony, Tr. p. 95."
Smith Exhibit No. 2 (Tr. 665); Smith Exhibit No. 10 (Tr. 874); Testimony of Dr. H. N. Fisk (Tr. 219-329); Testimony of Austin B. Smith (Tr. 808-822).

"5. The flow of the River was divided when the chute channel was formed and one branch of the thalweg continued in the channel around the island until that channel was filled and abandoned. The other branch of the channel was diverted into the chute cutoff and became the sole thalweg of the River when the old channel was abandoned. The division of the flow was caused by a submerged bar attached to the head of the island and extended upstream into the River to the point of the divided thalweg. This point of division is shown on Map 20 of Major Suter and is fixed as Point "S" on Exhibit 5 to Austin B. Smith's testimony."
Complainant's Map Exhibits to Bill of Complaint Nos. 7(a) and 7(b), Suter Map No. 20 from Reconnaissance of Major Suter of Year 1874, Mississippi River Commission Charts Nos. 49 and 50 of the year 1878-80 (Tr. 110); Report of Major Suter of date February 18, 1875, Smith Exhibit "A" (Tr. 660); Photostatic copy Annual Report Chief of Engineers for the year 1878, Part II, Smith Exhibit "B" (Tr. 662); Aerial Photographic Mosaic, Sessions No. 1 (Tr. 370) overlaid by Transparent Overlay Maps of Suter Map, Ses-

sions No. 3, and River Commission Survey of 1878-80, Sessions No. 4 (Tr. 370 and 393); "Geological Investigation of Diamond Island Towhead Area" by Harold N. Fisk, Ph. D., of date August 15, 1944, with Appendix Plates 1-11 (Tr. 45); Fisk Exhibits Nos. 5, 5(a) and 6 (Tr. 77, 82 and 143); Thalweg Positions Diamond Island Towhead (Plate 10-A), Fisk Exhibit No. 11 (Tr. 306); Testimony Dr. H. N. Fisk (Tr. 15-100, 148-158, 164-167, 181-190, 206-209, 224-226, 297, 333-345); Report of Mr. Austin B. Smith dated July 14, 1954 to Attorney General of Mississippi, Smith Exhibit No. 9. (Tr. 747); Testimony of Austin B. Smith (Tr. 651-661, 669-671, 678-680, 720-729, 747-749, 756-789, 822-831, 848-851, 858-870, 873-875); Testimony of Mr. Clarence O. Durham, Jr. (Tr. 1239, 1256); Testimony of Mr. Frank Welder (Tr. 1328-1332, 1382).

"6. When the old channel was abandoned the submerged bar came above water by deposition deposited upon it and formed a part of Diamond Island from the head of that island to the point of division of the current represented by Point "S" as marked on Exhibit 5 to the testimony of Austin B. Smith. This bar of gravel, sands and other material was attached to the part of the upper end of said Diamond Island Towhead between the original main channel of the Mississippi River and the main channel of the chute cutoff course and evidence of this point of diversion is yet in existence by the deposition of gravel shown on Temporary (contemporary) charts of the United States Engineers and of the Mississippi River Commission, observation of witnesses, photographs and borings, and is evident from an inspection of the premises; and since said gravel deposit is yet in existence, it is found that same was never eroded, washed away or destroyed. See

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

Number 11, Original

STATE OF MISSISSIPPI,

Plaintiff

versus

STATE OF LOUISIANA,

Defendant

REPLY BRIEF OF THE STATE OF LOUISIANA

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Chart 49, Mississippi River Commission, 1882, Complainant's Map Exhibit 10; Report of Dr. H. N. Fisk and photographs therein contained, Complainant's Fisk Exhibit No. 4; Testimony of Dr. H. N. Fisk, Tr. 77-82, 164, 167, 182, 190, 297; Testimony of Captain William H. Reed, Tr. 483-485, 516-517; Testimony of Austin B. Smith, Tr. 865-868, 873, and Complainant's Smith Exhibit No. 10; the Suter Map No. 20, Complainant's Exhibit No. 8, and interpretation thereof, testimony of Mr. Smith, Tr. 876-877; Testimony of Mr. Clarence O. Durham, Jr., Tr. 948-959, 971, et seq. 1142, 1239, et seq.; Testimony of Mr. Frank Welder, Tr. 1323, 1328, 1349, et seq."

We submit that no additional documentation is needed.

"7. The boundary between the States of Louisiana and Mississippi in the old channel was not changed by the avulsion and was fixed from Point "S" around the Island to the north and west at the position of the thalweg in that channel when the current ceased to flow therein and the water became stagnant by at least the period 1878-80."

Chart 49, Mississippi River Commission, 1882, Complainant's Map Exhibit No. 10 (Tr. 110); Report of Dr. H. N. Fisk with appended Plates 1 to 10, Complainant's Fisk Exhibit No. 4 (Tr. 45); the Suter Map No. 20, Complainant's Exhibit No. 8 (Tr. 110) and interpretation thereof, Testimony of Mr. Austin B. Smith (Tr. 876-877); Report of Major Charles R. Suter of date February 18, 1875 (Tr. 660); Photostatic copy Annual Report Chief of Engineers for year 1878, Part II (Tr. 662); Testimony of Dr. H. N. Fisk (Tr. 41-94, 129-141, 164, 167, 181-189, 221-225); Report of

Austin B. Smith dated July 14, 1954 to Attorney General of Mississippi (Tr. 747) and Testimony of Mr. Smith in presentation of his report (Tr. 643-670); Testimony of Mr. Austin B. Smith (Tr. 689-726, 754-756, 771-797, 845-848, 865-870); Complainant's Smith Exhibit No. 2 (Tr. 665); Complainant's Smith Exhibit No. 5 (Tr. 679).

This summarized Finding of Fact No. 7 necessarily follows from the preceding six Findings of Fact under the applicable law as to the effect of an avulsion.

"8. As Diamond Island Point Bar, subsequent to the occurrence of the avulsion and chute cutoff, continued to build downstream and westwardly by the gradual process of erosion and accretions, the flow of the waters through the chute cutoff eroded, caved in and washed away portions of the southerly side of Diamond Island Towhead, particularly off of the southwest end of same. While erosion was occurring by impingement of the current against Diamond Island Towhead at the westerly end thereof at the same time erosion was taking away portions of the Louisiana mainland to the west and southwest of the westerly end of Diamond Island Towhead. The maximum extent of this erosion of the west end of the Island is at that point in the thalweg of the original old and abandoned channel of the Mississippi River around Diamond Island Towhead (situated between Diamond Island Towhead and the Louisiana mainland at the west end of Diamond Island Towhead) which has been denoted as Point C at the westerly end of Diamond Island Towhead on Complainant's Exhibit 5 to the testimony of Mr. Austin B. Smith."

Complainant's Map Exhibits 1-29, inc. (Tr. 110); Geo-

logical Investigation of Diamond Island Towhead Area by Harold N. Fisk, Ph. D., dated August 25, 1944, with appended Plate No. 4 (Tr. 45); Testimony of Dr. H. N. Fisk (Tr. 142-148, 291-301); Sessions' Exhibits: Photographic Mosaic Exhibit 1 overlayed by Transparencies Sessions' Exhibits 4, 5, 6 and 7 (Tr. 370, 393, 403, 415, 419); Report of Austin B. Smith dated July 14, 1954 to the Attorney General of Mississippi, Smith Exhibit No. 9 (Tr. 747); Testimony of Austin B. Smith (Tr. 671-672, 742).

"9. In accordance with the legal principle concerning division of accretions urged by both the State of Mississippi and the State of Louisiana, I find that the boundary between the two States in the Diamond Island-Diamond Island Towhead area on the east should be fixed by beginning at the Point S as located on Exhibit 5 to the testimony of Austin B. Smith and extending across the accretions at right angles to the successive thalwegs along the line from Point S to Point S_1, Point S_2, Point S_3, Point S_4 to Point S_5; all as shown on said Exhibit 5 to the testimony of Austin B. Smith, and on the west should be extended across the accretions beginning at the Point C and along the line to Point C_1, Point C_2 and Point C_3, as shown on said Exhibit 5 to the testimony of Austin B. Smith. The points, according to the testimony, can be easily located upon the ground and an accurate description prepared by Mr. Austin B. Smith, a competent engineer, is set forth below in this report."

Refer to documentation under previously stated Findings of Fact and additionally refer to: Complainant's Smith Exhibit No. 5 (Tr. 679) and further Testimony of Mr. Austin B. Smith (Tr. 677-746);

Complainant's Smith Exhibit No. 11 (Tr. 875); Complainant's Smith Exhibit No. 2 (Tr. 665).

Corroborative evidence that the Diamond Island Towhead area encompassed within the boundary as recommended by the Special Master was formed to Diamond Island Towhead and is a part of the State of Mississippi will be found in the following: Testimony of Captain William H. Reed (Tr. 468, et seq.); of witness L. C. Dunmore (Tr. 535, et seq.); of witness L. M. Spencer (Tr. 595, et seq.); Complainant's Exhibits "R-10" to "R-36", inc. (Tr. 426-437), with particular attention called to certified copy of sketch map made from Official Map of Warren County, Mississippi dated 1888, Complainant's Exhibit "R-13" (Tr. 430); Certified copy of records of Warren County, Mississippi delinquent tax sales and certified copy of forfeited tax land patent from State of Mississippi to Florence Mackey dated July 19, 1887, Complainant's Exhibits "R-10" and "R-11" (Tr. 428 and 429); Findings of Fact and Conclusions of Law and Final Decree of the Chancery Court of Adams County, Mississippi in Cause No. 7277 that Court, Complainant's Exhibits "R-33A" and "R-33B" (Tr. 436 and 437); affirmed by Supreme Court of Mississippi *Sharpe and Stricker* v. *Learned*, 32 So. (2d) 141.

See also admission by witnesses for Louisiana that accretions attached to Diamond Island Towhead and to the upstream projected bar at the head of Diamond Island Towhead between the "divided thalwegs", Testimony of Mr. Clarence O. Durham, Jr. (Tr. 901, 1239-1240, 1256-1258); Testimony of Mr. Welder, "Now I can't deny that sediment has been deposited all around Diamond Island. It's obvious that it has, but . . . well, that is my geological interpretation of it." (Tr. 1323).

Summary of Findings of Fact as to Diamond Point

"1. I find, based upon the admissions of the State of Louisiana and upon the evidence, that Diamond Point is located in the State of Mississippi, and that the correct boundary between the States of Mississippi and Louisiana in the Diamond Point area is as described in the next part of this report."

Admissions of the State of Louisiana (Tr. 5-6, 8-11); Complainant's Map Exhibits 10, 14-18, 20-35 (Tr. 110); Geological Investigation of Diamond Island Towhead Area by Harold N. Fisk, Ph. D., of date August 25, 1944 with Appendix Plates 1-11 (Tr. 45); Fisk Exhibit No. 8 (Tr. 147); Fisk Exhibit No. 10 (Tr. 303); Exhibits to Testimony of J. Proby Sessions, C. E., Aerial Photographic Mosaic Sessions No. 1 superimposed by transparent overlays of Sessions Nos. 2 to 9, inc. (Tr. 370-419, 465-467); Testimony of Dr. H. N. Fisk (Tr. 122-128, 142-148, 286-307, 308-319); Testimony of Mr. John L. Hyland (Tr. 442-456); Complainant's Exhibits Hyland No. 1 and No. 2 (Tr. 452-453); Testimony of Captain William H. Reed (Tr. 504-511); Report of Austin B. Smith of date July 14, 1954 to Attorney General of Mississippi, Smith Exhibit No. 9 (Tr. 747); Complainant's Smith Exhibits 1, 2, 3-A, 3-B, 4 and 5 (Tr. 664, 665, 666, 668, 679); Smith Exhibit No. 11 (Tr. 875); Smith Exhibits Nos. 12-14, inc. (Tr. 1422, 1434, 1440); Complainant's General Exhibits "AA" (1), (2) and (3) (Tr. 422); Complainant's General Exhibit "BB" (Tr. 422); Testimony of Austin B. Smith (Tr. 643-669, 875, 439); Testimony of Mr. Clarence O. Durham, Jr. (Tr. 1070-1102); Testimony of Mr. Frank Welder (Tr. 1383-1387).

"2. I find that under the doctrine of prescription the State of Mississippi has acquired title to the area known as Diamond Point and that its claim thereto has been acquiesced in by the State of Louisiana over a long period of time."

Testimony of Captain William H. Reed (Tr. 504-511); Testimony of Mr. J. C. Hunter (Tr. 633-639); Complainant's General Exhibits "R-1" to "R-9", inc. (Tr. 423-428; Complainant's General Exhibits "R-39" to "R-47", inc. (Tr. 631-639, and 880).

Conclusion

On the basis of the facts of this case as specially found by the Special Master and his conclusions of law thereon as submitted and reported to the Court, the Master has found and concluded that the state boundaries involved in this suit are as described in Part V of his Report, pages 51-56, inclusive.

This finding and conclusion of the Master is in accord with the evidence and with the law and the jurisprudence of this Court, correctly applied to the facts.

The boundaries have been found, located and described by the Master, accurately, with certainty and by geodetic positions (North American Datum), on Complainant's Exhibit Smith No. 5 and in Part V, pages 51-56, inclusive, of his Report.

The State of Mississippi respectfully urges that the Report of the Special Master be confirmed and that the decree recommended by the Master be entered fixing and establishing the true boundary between the States of Louisiana

and Mississippi at the places involved in this case to be as set forth under Part V of the Master's Report.

Respectfully submitted,

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Certificate

This is to certify that copies of the foregoing brief have been served upon counsel of record of the State of Louisiana by mail, deposited in a United States mail box, with first class postage prepaid, addressed to counsel of record of the State of Louisiana at the post office address listed.

This August —, 1955.

Special Assistant Attorney
General of the State of Mississippi.

(3539-4)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

Number 11, Original

STATE OF MISSISSIPPI,

Plaintiff

versus

STATE OF LOUISIANA,

Defendant

REPLY BRIEF OF THE STATE OF LOUISIANA

To the Honorable Supreme Court
of the United States of America:

This reply brief is applicable to:

PART A

DIAMOND ISLAND TOWHEAD AREA

of the original brief by Louisiana.

The first and most important issue, under the "Diamond Island Towhead Area" part of this case, is the location of the eastern terminus of the boundary in the part of the channel

that became the "old channel," sometime after the avulsion in the 1860's. The Court can refer to Plate I of Louisiana's original brief herein and thereby better understand the conflicting contentions of the two states:

(a) Mississippi contends, and the Special Master found, that the Point "S" on such Plate I was the eastern terminus of the boundary in the "old channel" around the island. The boundary as found by the Special Master then proceeded in a generally northwesterly direction, across land (Bedford Bar), which is opposite the easterly part of the island, to that part of the channel that is generally northerly of the island. This Point "S" was Mississippi's contention as to the take-off place for a division of the accretions that subsequently accrued in this area, the line of division being the state line.

(b) Louisiana contends that the eastern terminus of the boundary around the island is more than a mile downstream and generally northwest from said Point "S"; and that such point is in the "old channel" approximately just east of the head of the island shown on such Plate I. From such point, Louisiana contends that the boundary continues around the island in the "old channel" as shown on Plate I. This point (eastern terminus) in the "old channel," where the current ceased to flow is Louisiana's contention as to the take-off place for a division of the accretions that subsequently accrued in this area; the line of division being the state line.

The legal argument for Louisiana's position is the holding by this Court in *Arkansas v. Tennessee*, 246 U. S. 158, 38 S. Ct. 301, 62 L. Ed. 638, viz:

". . . where the course of the stream changes through the operation of the natural and gradual processes of ero-

sion and accretion, the boundary follows the stream; while if the stream leaves its former bed and establishes a new one as a result of an avulsion, the boundary remains in the middle of the former channel. An avulsion has this effect, whether it results in the drying up of the old channel or not. So long as that channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; but when the water becomes stagnant, the effect of these processes is at an end: the boundary then becomes fixed in the middle of the channel as we have defined it, and the gradual filling up of the bed that ensues is not to be treated as an accretion to the shores but as an ultimate effect of the avulsion."

Thus, Louisiana contends, as demonstrated by said Plate I, that the boundary remained in the "old channel" after the avulsion,

> "So long as that channel remains(s) (ed) a running stream . . . .";

and that so long as such channel remained a **running stream** the boundary marked by it was,

> ". . . still subject to be changed by erosion and accretion;"

and that this "old channel" remained a **running stream** at least through the time depicted on said Plate I.

The legal contention of the State of Mississippi, and as found and stated by the Special Master, is

> "I believe that when the old channel has so far deteriorated and become so filled by deposition as that it can no

> **longer be used for navigation** except in times of flood, it no longer has a thalweg. When the filling has proceeded to the point that **no water can enter the channel at low stages of the river,** which are normal during certain periods of the year, **there is then no current in the old channel** and the water has become stagnant." (Master's Report, page 10) (Emphasis supplied.)

Thus, Mississippi and the Special Master say that this "old channel" ceased to be a running stream when there was no water in such channel **at some periods during the year at a low water stage of the river.** (The contention about navigability being answered later on in this brief.)

We submit, then, that the real dispute between the states is boiled down to opposing contentions of the legal meaning of the words "running stream" as used by this Court in *Arkansas v. Tennessee*, supra. Mississippi contends (as was held by the Special Master) that this "old channel" of the Mississippi River was no longer a **running stream** when

> "... **no water can (could) enter the channel at low stages of the river**, which are (were) normal at certain periods of the year, there is (was) no current in the old channel and the water has (had) become stagnant."

Louisiana, to the contrary, contends that the fact that there was no low water flow for certain periods of the year in this "old channel" of the Mississippi River, is not the test as to when it ceased to be a running stream. Louisiana, in such contention, is supported by numerous holdings of appellate courts of many states, without any contrary view insofar as our research reveals. For a gathering of these decisions here relied on by Louisiana, we refer the Court to the *Ameri-*

can Digest System "Waters and Water Courses," key 38 "What constitutes a water course." See also, *Words and Phrases*, "stream" (continuous flow sub-head) and "running stream." We refer to a few of such cases, viz:

> " 'Running Stream' consists of a well defined channel with sides or banks, in which water habitually flows, **although it need not flow continuously.**" (*State v. Hawk*, 208 P. 709, 714, 105 Ore. 319.)

> "To constitute a running stream or water course, for the obstruction of which an action will lie, there must be a stream usually flowing in a particular direction, though it need not flow continually. **It may sometimes be dry.** It must flow in a definite channel, having a bed, sides, or banks, and must usually discharge itself into some other stream or body of water." (*Hebron Gravel Road Company v. Harvey*, 90 Ind. 192, 196, 46 Am. Rep. 199.)

> "A 'stream' consists of a bed, banks, and watercourse, and is a course of running water contemplating a body of water having a continuous flow in one direction, but, although it must have substantial existence, **it is not required that it flow continuously throughout the year** or throughout its course." (*St. Paul Fire and Marine Insurance Company v. Carroll*, Tex. Civ. App. 106 S. W. 2d 757, 758.)

> "A **continuous flow is not necessary** to coristitute a stream in its waters 'stream waters.'" (*Southern Pacific Company v. Proebstel*, 150 P. 2d 81, 61 Ariz. 412.)

> "A 'water course' is a running stream of water; a natural stream including rivers, creeks, runs and rivulets; **the stream need not flow continuously**, though there must be a definite channel having a bed and banks and something more than mere surface drainage over a tract of land

occasioned by unusual freshets or extraordinary causes." (*Brasko v. Prislovsky*, 183 S. W. 2d 925, 207 Ark. 1034).

"A stream is a water course having a source and terminus, banks and channels through which **waters flow at least periodically** and it usually empties into other streams, lakes or the ocean, but it does not lose its character as a water course even though it may break up and disappear." (*Everett v. Davis*, 107 P. 2d 650, subsequent opinion 115 P. 2d 821, 18 Cal. 2d 389.)

"A water course is a stream of water flowing in a definite channel, having a bed and sides or banks, and discharging itself into some other stream or body of water; **and the flow of water need not be constant,** but must be more than mere surface drainage occasioned by extraordinary floods, and there must be substantial indications of the existence of a stream, which is ordinarily a moving body of water." (*Scott v. Watkins*, 122 P. 2d 220, 63 Idaho 560.)

"A winding bayou, ten to twelve feet in depth, connecting lake with river and having well defined banks and channel, **and containing running water most of the year,** the volume depending upon the rainfall and stage of the river was a natural water course and water while confined in channel was not surface water." (*Keener v. Sharp*, 111 S. W. 2d 118, 341 Mo. 1192, transferred 95 S. W. 2d 648.)

"That flow of water along a regular water course is intermittent does not affect its character as a water course." (*Harmon v. Gould*, 94 P. 2d 749, 1 Was. 2d 1.)

"A natural water course is a water course which has a well defined bed and banks of varying width and depth, through which water is conveyed and discharged into some substantial reservoir or body of water, **but it is not necessary that there be a continual flow."** (*Palmer v. Massengill*, 58 So. 2d 918.)

"Stream did not lose character as natural stream because in periods of small rainfall no water flowed in it." (*Yaskill v. Thibault*, 173 N. E. 504, 273 Mass. 266.)

"Water course, is stream in definite channel discharging into another body of water **though not flowing continuously,** but resuming flow and definite course between recognized banks." (*East Bay Sporting Club v. Miller*, 161 N. E. 12, 118 Ohio St. 360.)

We contend then that Mississippi and the Special Master are in error when they say that this "old channel" ceased to be a running stream when,

"no water can (could) enter the channel at low stages of the river. . . .'

Mississippi erroneously also attempts to tie onto the words "running stream," as used by this Court in *Arkansas v. Tennessee*, supra, some connection with navigation, and speaks of this old channel not having a thalweg at some low water stages of the river. She then reasons that if a channel can no longer be navigated at some low water stages it has no thalweg, and, of necessity is then not a "running stream." The Special Master adopts Mississippi's argument and holds (Report, pp. 10, 11 & 12) that the "old channel" around the island in 1874, could

". . . no longer be used for navigation except in times of **flood**. . . ." (Report, p. 10) (Emphasis supplied.)

The Master's opinion was premised on Major Suter's map (see Plate II of La.'s original brief) and Major Suter's report

(R. 662) which accompanied the Chart (said Plate II) wherein Suter's report said,

> ". . . the bend of Diamond Island sixteen miles below Vicksburg, filled up, and the channel established itself permanently in the chute." (Report, 40)

The Special Master's holding that this "old channel" was only navigable at "flood" waters flies in the face of the survey made by the Mississippi River Commission in 1878-80, as set forth on Plate I of La.'s original brief (Exhibit La. Cross-exam. Fisk No. 4 (R. 328-9)) and the Mississippi River Commission's notes on Exhibits 4-A and 4-B (R. 3289) which show a running stream in this "old channel" some five years after the time the Special Master said it was "filled up" at a low water stage of the Mississippi River, and no longer a navigable stream. See the Mississippi River Commission's notes on La. Cross-Exam. Fisk 4-B, wherein it is set forth that on this Plate I,

> "The adopted stage is about one-third of the extreme oscillation above low water."

Thus, this navigability contention is without substance: first, because this Court said in *Arkansas v. Tennessee*, supra, that

> "So long as that channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; . . . .";

therefore, the test is whether the stream was a "running stream" and not whether it was a navigable one. Second, even if this navigability contention had actual backing, then it is clear that the "old channel" met the test of navigability as late as 1878-80, as depicted on Plate I, for the water in this "old channel" as so depicted on Plate I, was only "one-third of the extreme oscillation above low water" (notes on Exhibit La. Cross-Exam. Fisk 4-B). Thus, this "old channel" was navigable at least at all times during the other two-thirds of the stages above low water. This Court held in its opinion, *United States v. Appalachian Electric Power Co.*, 311 U. S. 377, 61 S. Ct. 291, 300, 85 L. Ed. 243, viz:

> "Nor is it necessary for navigability that the use should be continuous."

We fail to see the relevancy of the case of *Handley's Lessee v. Anthony, et al.*, 5 Wheaton 374, 5 L. Ed. 113, so heavily relied on by the State of Mississippi and quoted at length in the Special Master's Report (R. 10 and 11). In that case the only questions decided were: First, "Whenever a river is a boundary between states, it is the main, the permanent river, which constitutes that boundary." Certainly that legal proposition has no relevancy to the question here, that is, in the case of an avulsion, the boundary remains in the "old channel" which is subject to be changed by erosion and accretion so long as that "old channel" remains a running stream. Second, in that case the State of Virginia retained the river within its bounds, this Court said, because in its grant to Congress it only conveyed that territory "situate, lying, and being, to the north-west of the river Ohio." The point then decided was that the State of Indiana went to the low water mark of the river. There is

further no relevancy of such determination to the point at issue here, for here, the question is when does a stream cease to be a "running stream."

The correct legal conclusion, we submit, as to the location of the eastern terminus of the boundary in the part of the channel that became the "old channel," sometime after the avulsion in the 1860's is at the head of and in the "old channel," when it ceased to be a running stream; and it only ceased to be a running stream sometime after 1878-80, for it was obviously then shown (see said Plate I) as still a running stream. Clearly then, this "old channel" changed from its position in 1874 as found by the Special Master premised on when the water first ceased to flow **at low water** therein (claimed to be as depicted on Plate II of La.'s original brief), to at least the position of the "old channel" in 1878-80 as located by the Mississippi River Commission on its chart (see Plate I of La's original brief)—and this change of location of the "old channel" was by erosion and accretion brought about by the "old channel" remaining a **running stream** from 1874 through at least 1878-80. For the course of this stream could only have been changed through the operation of the natural and gradual processes of erosion and accretion, as there is no evidence whatsoever as to a second avulsion at such point. This last "old channel," though now long since abandoned by a current of a running stream, is yet visible on the ground today, and has been recently surveyed (La. Exhibit No. 36—R. 1325). The chief witness for the State of Mississippi (Fisk) also so located this last channel, see particularly his Plates 8 and 10 of Mississippi's Exhibit Fisk 4 (R. 46). Thus, the eastern terminus of the boundary in the "old channel," now long since

abandoned, is shown on said survey (La. Exhibit No. 36—R. 1325). Further, the "old channel" as so surveyed on the ground today, is approximately in the same position as it was in 1878-80 as shown on Exhibit La. Cross-Exam. Fisk No. 4—R. 328-9 (Plate I of La.'s original brief).

The foregoing legal propositions besides controlling the location of the "old channel" around Diamond Island equally control the location of the boundary in the old channel of the Mississippi River at Oak Bend, which is the southerly boundary of the Diamond Island Towhead Area, that is, inasmuch as such "old channel" at Oak Bend yet remains a running stream even to this day, the boundary marked by it is still subject to be changed by erosion and accretion, despite the fact that some low water ceased to flow therein in 1939.

The other remaining questions as to this Diamond Island Towhead Area have to do with the ownership of the accretions, and alternatively the division thereof between the states, all of which are covered in our original brief. Such remaining questions turn on the location of the eastern terminus of the boundary in the "old channel" around the island.

CONCLUSION

We submit that Mississippi and the Special Master erred in contending and holding that this "old channel" ceased to be a running stream when,

> "No water can (could) enter the channel at low stages of the river. . . ."

We further submit that the boundary should be fixed in the "old channel" when it ceased to be a running stream.

Respectfully submitted,

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CERTIFICATE

This is to certify that copies of the foregoing brief have been served upon counsel of record of the State of Mississippi by mail, deposited in a United States mail box, with first class postage prepaid, addressed to counsel of record of the State of Mississippi at the post office address listed.

Baton Rouge, Louisiana, October ___, 1955.

ASHTON L. STEWART
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State of Louisiana

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

Number 11, Original

STATE OF MISSISSIPPI,
Plaintiff

versus

STATE OF LOUISIANA,
Defendant

Application for Rehearing in Behalf of the State of Louisiana

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To the Honorable Supreme Court of the United States of America:

The State of Louisiana, defendant, presents this petition for a rehearing, and in support thereof, respectfully shows:

I.

The Master's report, which was adopted by this Court, held that the **accretions** to that part of the Louisiana shore from a point on the shore opposite the head of the island, **upstream** for more than a mile to a point on the shore opposite Point "S" (shown on Plates I and II of Louisiana's Original Brief), did not belong to Louisiana. He did not hold that such shore was not Louisiana territory, **but he did hold that the accretions to that shore were not Louisiana territory**. His theory was that when the old channel left after the avulsion,

". . . has proceeded to a point that no water can enter the channel at low stages of the river, which are normal during certain periods of the year, there is then no current in the old channel and the water had become stagnant." (Report p. 10)

The Master then seemed to contend from that premise that because the "thalweg" of the river in the old channel had at some prior time extended upstream from a point in the old channel opposite the head of the island to his Point "S" in the main channel that, therefore, the boundary was frozen from the head of the island as far upstream as Point "S." This holding despite the fact that this Bedford Bar (Louisiana shore) to which the accretions attached, **at all times,** fronted on and was bounded by that portion of the Mississippi River that was upstream from the island. Despite the fact that this shore was not the shore on the old channel around the island, but was the shore to the river upstream from the island. And despite the fact that such portion of the river (upstream from the island) by erosion and accretion changed its course gradually in front of Bedford Bar by alluvial formations, accretion to Bedford Bar, that is, accretions to Louisiana's shore. And despite the fact that Louisiana is entitled to still hold by the same boundary, including the accumulated soil fronting on the river, since the accretions were to her shore.

The legal situation presented with reference to the location of the boundary in that part of the old channel that is **downstream** (as distinguished from the above portion, which is upstream) from the head of the island is entirely different from the legal situation with reference to the location of the boundary in such part of the Mississippi River **upstream** from the head of the island. The law applicable to that part of the

boundary in the old channel which was **downstream** from the island, and which was the abandoned channel, which contained the state boundary is controlled by *Arkansas v. Tennessee*, 246 U. S. 158, 385 S. Ct. 301, which was the exception to the general rule, viz.:

> "An avulsion has this effect, whether it results in the drying up of the old channel or not. So long as that channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion;"

Whereas, with reference to the accretions to that portion of the Louisiana shore (Bedford Bar), from a point opposite the head of the island **upstream** to a point opposite Point "S," the general rule is applicable, which we will now briefly point up:

It is admitted by all parties that the land in dispute here was formed by accretions—that such accretions were formed to the right descending bank of the Mississippi River—that the land to which such accretions were formed, from a point on the right or Louisiana shore opposite the furthermost upstream point of the island, on upstream to a point on the shore opposite Point "S," was Louisiana, called "Bedford Bar." These accretions to Louisiana's Bedford Bar have been held here by the Master to belong to Mississippi—wrongly so held, we submit, for the reason that the State of Louisiana, as proprietor of the land fronting on the Mississippi River, is entitled to all of the accretions to her shore. This point has nothing to do and is not relative to any question of avulsion, for the old channel left by the avulsion only commences at the head of the island, and what we are now talking of is upstream from such point. And even if the thalweg which entered into the old channel did at one time extend on upstream

from the head of the island in the channel to Point "S," nevertheless, such was still in the stream which bounded Bedford Bar, and the accretions were to Bedford Bar in this same stream. This principle that accretions belong to the front proprietor was decided by this Court in *New Orleans v. United States*, 10 Peters 661, 9 L. Ed. 573, viz.:

> "The question is well settled at common law that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and as he is without remedy for his loss, in this way, he cannot be held accountable for his gain.
>
> "This rule is no less just when applied to public, than to private rights. The case under consideration will illustrate the principal."

Also, in *Nebraska v. Iowa*, 143 U. S. 359, 12 S. Ct. 396, viz.:

> "It is settled law that when grants of land border on running water, and the banks are changed by that gradual process known as 'accretion', the riparian owner's boundary line still remains the stream, although, during the years, by this accretion, the actual area of his possessions may vary."

And the same case held that in such respect there was no difference in the rule between private individuals and states, viz.:

> "These propositions, which are universally recognized as correct where the boundaries of private property touch

on streams, are in like manner recognized where the boundaries between states or nations are, by prescription or treaty, found in running water. Accretion, no matter to which side it adds ground, leaves the boundary still the center of the channel."

This Court likewise in *Arkansas v. Tennessee*, 246 U. S. 158, 38 S. Ct. 301, decreed that even in the case of an avulsion, which was the exception to the general rule, the boundary in the old channel was still subject to be changed by erosion and accretion. Thus, this last case did no more than follow, in this respect, the same general rule fixed in *New Orleans v. United States*, supra, viz.:

". . . the person whose land is bounded by a stream of water, which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil."

This Court said in such *New Orleans v. United States*, supra, and was quoted and followed in *Missouri v. Nebraska*, 196 U. S. 23, 25 S. Ct. 155, viz.:

" 'No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and as he is without remedy for his loss, in this way, he cannot be held accountable for his gain.' It was added—what is pertinent to the present case—that 'this rule is no less just when applied to public than to private rights.' "

Plate II of Louisiana's original brief was the very premise used by the Master in fixing the boundary suggested by him. By view of this Plate II it can be seen that the part of the Louisiana shore, opposite the head of the island on up-

stream to a point on the shore opposite Point "S," is unquestionably the shore to which the accretions were added, which are here in dispute. That portion of the Louisiana shore (which is upstream from the island) (Bedford Bar) is entitled to that which was added by accretion, and what was added by accretion to this shore is what Louisiana here contends for, that is, the accretions to the Louisiana shore **upstream** from the head of the island.

If the Court will but refer to any (see Louisiana Exhibit No. 43, R 1398) of the numerous Mississippi River Commission Charts since 1878-1880 (Plate I of Louisiana's brief) it will see that the accretions were to the Louisiana shore upstream from the head of the island. Even the present-day charts clearly so show.

Accordingly, we submit that which we contended for in our original brief (page 13 et seq.) that the accretions to the Louisiana shore (Bedford Bar) upstream from the head of the island belong to Louisiana. This Bedford Bar fronted on a stream and accretions were formed to the Bar. Under the above jurisprudence such accretions can only belong to Louisiana.

II.

We have hereinabove spoken of the accretions to the Louisiana shore **upstream** from the head of the island. Now, for another reason why the Master's opinion is erroneous: The reasons given by the Master for freezing the boundary in the old channel **downstream** from the head of the island run counter to *Arkansas v. Tennessee*, supra. The Master said, viz.:

> "When . . . no water can enter the channel at low stages of the river, which are normal during certain periods of

the year, there is then no current in the old channel and the water has become stagnant." (Report 10)

This Court in *Arkansas v. Tennessee*, supra, **in its decree**, which is opposed to the Master's holding, fixed the boundary, viz.:

"Upon the whole case we conclude that the questions submitted for our determination are to be answered as follows:

". . . . .

"(3) The boundary here should now be located according to the middle of that channel **as it was at the time the current ceased to flow therein as a result of the avulsion** of 1876.

". . . .

"(5) **The nature and extent of the erosion and accretions that occurred in the old channel prior to its abandonment by the current as a result of the avulsion of 1876,** and the question whether it is practicable now to locate accurately the line of the river as it then ran, will be referred to said commission, ..."

Arkansas v. Tennecssee, supra, under its decree above quoted, did not make any distinction between erosion and accretion at low water and erosion and accretion at other stages of the river. But the Master did, and we submit that his decision is in conflict with *Arkansas v. Tennessee*, supra.

We submit, then, that the erosion and accretion in this old channel **downstream** from the head of the island should not be stopped at some speculative place, but that there was

erosion and accretion that actually took place and moved the channel to its present position when the current last ceased to flow therein. The present location thereof is approximately as shown on the Mississippi River Commission survey of 1878-80 (See Plate I of Louisiana's original brief). Certainly, it was the accretion to Bedford Bar which caused this old channel to meander to the position shown on such Plate I. And the old channel is on the ground today and it shows "the nature and extent of the erosion and accretions that occurred in the old channel prior to its abandonment by the current as a result of the avulsion." *Arkansas v. Tennessee*, supra.

Finally, as to this old channel, we submit that it only came to be in the position as shown on the 1878-80 survey (Plate I of Louisiana's original brief) as a result of previous erosion and accretions. How else could it have gotten there? The channel as shown on this survey is approximately the same old channel surveyed on the ground today.

III.

The Special Master at no time attempted to meet the impact of the heavily settled jurisprudence of this Court that, as to the accretions, **upstream** from the head of the island to the Louisiana shore (Bedford Bar) that such accretions by adding to the Louisiana shore which fronted on the Mississippi River, necessarily became the property of Louisiana. We have discussed this under Part I hereof. Under this argument, it does not matter when the current ceased to flow in the old channel, for this part of the Louisiana shore did not front on the old channel around the island, it fronted on the main channel upstream from the head of the island.

However, as to the boundary downstream from the head of the island, the reasoning of the Master was that when the current first ceased to flow in this old channel at **some seasonal low water stages,** why the accretions thereafterwards to the Louisiana shore along such part of the river, did not belong to the land to which they formed. We have discussed this under Part II hereof.

Next, the Master contended that when the old channel could not be navigated **at some seasonal low water stage,** why, as he said, this old channel "no longer has a thalweg." The short answer to this claim of the Master is found in the cases decided by this Court, such as *Economy Light and Power Company v. United States*, 256 U. S. 113, 41 S. Ct. 409, from which we quote, viz.:

> "The Circuit Court of Appeals, in passing upon the question of navigability correctly applied the test laid down by this court in the Daniel Ball, 10 Wall. 557,563, 19 L. Ed. 999, and The Montello, 20 Wall. 430, 440-443, 22 L. Ed. 391; that is, the test whether the river, in its natural state, is used, or capable of being used as a highway for commerce, over which trade and travel is or may be conducted in the customary modes of trade and travel on water. Navigability, in the sense of the law, is not destroyed because the water course is interrupted by occasional natural obstructions or portages; **nor need the navigation be open at all seasons of the year, or at all stages of the water."**

Corpus Juris Secundum, Vol. 65, Navigable Waters, Sec. 6(c), page 56, says:

"A stream, in order to be constituted a navigable stream,

need not be perennially so but may be floatable only at certain seasons."

The case of *United States v. Utah*, 283 U. S. 64, S. Ct. 438, held certain rivers in Utah were navigable even though at some seasons of each year the water in such rivers was so low that they could not be navigated.

We submit that the Master's reasoning is erroneous when he said that this old channel "no longer had a thalweg" when at a seasonal low water the old channel could not be navigated. Even though the thalweg (or state boundary) in this old channel did become fixed at some seasonal low water, the thalweg became live and active in the remaining seasons of the year when the channel was a running stream capable of being navigated. We submit that seasonal changes as existed up to 1878-80 did not cause this old channel to cease forever to become navigable at the first seasonal low water stage, when at other seasons of the year it was navigable in fact. This old channel only came to be in the position shown on Chart I of Louisiana's original brief as a result of current flowing therein causing erosion to one side and accretion to the other.

IV.

The question of boundaries between the states bordering on the Mississippi River, as well as other rivers in alluvial plains, is a continuing and ever present one. Of much importance to the states, too. There have been numerous disputes settled between the states under and by authority of the cases here relied on by the State of Louisiana. Many lower courts, both state and federal, have followed these cases, especially *Arkansas v. Tennessee*, supra. Now, this Court, Louisiana con-

tends, has adopted a Master's report which certainly deviates from and conflicts with the jurisprudence fixed by this Court. This Court has not seen fit to adjudicate the contentions of the sovereign State of Louisiana. Fact and reasoning, we contend, have not been given in the form of an opinion by this Court in answer to Louisiana's contentions. We believe she was and is entitled to an opinion, wherein reasons are set forth as to why her contentions are right or wrong.

The framers of our constitution and the lawmakers believed the problem of differences between states was such a high and important matter that they gave this Court exclusive original jurisdiction thereof. The only other category which this Court has exclusive original jurisdiction over is with reference to ambassadors of other nations. As Mr. Justice Douglas, as organ of this Court in *Georgia v. Pennsylvania Railroad*, 324 U. S 439, 65 S. Ct. 716, said, viz.:

> "The original jurisdiction of this Court is one of the mighty instruments which the framers of the Constitution provided so that adequate machinery might be available for the peaceful settlement of disputes between states and between a state and citizens of another state . . . . . **The traditional methods available to a sovereign for the settlement of such disputes were diplomacy and war.** Suit in this Court was provided as an alternative."

Again, the late great Mr. Justice Holmes, as organ of this Court in *Virginia v. West Virginia*, 220 U. S. 1, 31 S. Ct. 330, stated, viz.:

> "The case is to be considered in the untechnical spirit proper for dealing with a quasi international controversy, remembering that there is no municipal code governing the matter, and that this Court may be called on to adjust

differences that cannot be dealt with by Congress or disposed of by the Legislature of either state alone.

"As this is no ordinary commercial suit, but, as we have said, **a quasi international difference,** referred to this Court in reliance upon the honor and constitutional obligations of the states concerned rather than upon ordinary remedies, we think it best at this stage to go no further, but to await the effect of a conference between the parties, which, whatever the outcome must take place. . . . Great states have a temper superior to that of private litigants, and it is to be hoped that enough has been decided for patriotism, the fraternity of the union, and mutual consideration to bring it to an end."

Finally, this Court said in the early case of *Rhode Island v. Massachusetts*, 9 L. Ed. 1233, in speaking of boundary disputes between states, that prior to the adoption of the Constitution, each state had a right to settle its boundary dispute with another state **by a treaty, or failing treaty, by war.** The constitution barred both methods and provided that the boundary could be settled by agreement, if approved by Congress, or else by judicial authority. The agreement of the states to submit their boundary disputes to judicial authority was believed to be of such a high order, dealing with the sovereignty of the states, that original jurisdiction of the highest court of the land was fixed. By statute this jurisdiction was fixed exclusively in this court.

Furthermore, from our research of the matter, this case is the first case between two sovereign states wherein this Court has not handed down an opinion in which the contentions of the states were answered.

Accordingly, the State of Louisiana requests that, in the event a rehearing is not granted herein, that an opinion of this Court be handed down in which Louisiana's contentions that the Master's opinion is in conflict with other entrenched jurisprudence of this Court, are answered.

CONCLUSION

It is submitted that the fundamental principle that a person or state, whose land is bounded by a stream of water, which changes its course gradually by alluvial formations (accretions), shall still hold by the same boundary, including the accumulated soil. Such was applied by *Arkansas v. Tennessee* even to the old channel in case of an avulsion. This Court by adopting the Master's report has held differently from such fundamental principle.

It is further submitted that the seasonal low waters which prevented navigation during such season of low water in this old channel did not cause the old channel to immediately cease to be navigable where it was navigable in fact during all of the other seasons of the year, nor did such seasonal low waters cause the channel to cease to be a running stream.

Rehearing should be granted and all of Louisiana's exceptions maintained.

Respectfully submitted,

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CERTIFICATE

This is to certify that this application for a rehearing in behalf of the State of Louisiana is presented in good faith and not for delay; and that copies of the foregoing petition for rehearing have been served upon counsel of record of the State of Mississippi by mail, deposited in a United States mail box, with first class postage prepaid, addressed to counsel of record of the State of Mississippi at the post office address listed.

Baton Rouge, Louisiana, November ____, 1955.

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